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IN THE SUPREME COURT OF THE UNITED STATES

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GENESIS HEALTHCARE :

CORPORATION, ET AL., :

Petitioners : No. 11-1059

v. :

LAURA SYMCZYK :

- - - - - x

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.

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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,

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

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

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

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

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

25 I think the way that I would put it, looking

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

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

14 MR. MANN: Well, let me --

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

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

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

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

3 JUSTICE SOTOMAYOR: How did you pick the
4 \$7,500?

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

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

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

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

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

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

15 So what we --

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

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

25 One is the question that was presented in

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

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

9 And so --

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

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

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

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

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

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

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

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

22 JUSTICE KENNEDY: Let me ask you this --

23 CHIEF JUSTICE ROBERTS: Justice Kennedy.

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

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

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

7 MR. MANN: There's --

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

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

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

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

25 JUSTICE KENNEDY: Right.

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

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

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

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

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

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

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

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

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

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

1 interest is moot.

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

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

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

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

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

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

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

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

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

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

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

9 MR. MANN: It wouldn't make any difference.
10 What Geraghty turns on, and -- and I encourage you to
11 look at the portion of footnote 11 that -- the last two
12 paragraphs of that footnote that goes over onto page
13 407, the court emphasizes, all we're saying here, all
14 we're saying here is that if the basis of mootness is an
15 error by the district court and if we later ascertain
16 that error, we will not only correct the error about
17 certification, but we will forgive the mootness that
18 flowed from that error.

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

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

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

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

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

14 JUSTICE SOTOMAYOR: Counsel, I have --

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

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

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

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

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

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

13 CHIEF JUSTICE ROBERTS: Well, what do you --

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

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

23 MR. MANN: So again --

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

1 to refuse it at a specific penalty?

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

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

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

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

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

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

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

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

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

25 It was addressing just the third prong of

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

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

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

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

24 JUSTICE KAGAN: But, Mr. Mann --

25 JUSTICE ALITO: Can I ask this question?

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

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

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

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

17 JUSTICE ALITO: What is it under?

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

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

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

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

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

9 MR. MANN: But the court --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 JUSTICE BREYER: Oh, we know at least, since
17 we are doing -- I looked up a little bit, but Article
18 III is what was a case or controversy in Westminster in
19 1788 or 1750 or whenever, that in Westminster, in a
20 court of equity, I found at least two instances, a
21 person dies, there is no case with that person, but it
22 remained in equity on the docket until the other person,
23 the estate, came in.

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

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

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

9 JUSTICE SCALIA: Equity is wonderful.

10 JUSTICE BREYER: What? Yes.

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

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

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

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

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

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

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

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

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Mr. Katyal.

16 ORAL ARGUMENT OF NEAL KUMAR KATYAL

17 ON BEHALF OF THE RESPONDENT

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

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

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

4 MR. KATYAL: Absolutely, Your Honor.

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

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

16 Here is the question presented as my friend
17 Mr. Mann wrote it: Whether a court -- "Whether a case
18 becomes moot and thus beyond the judicial power of
19 Article III when the lone plaintiff receives an offer
20 from the defendants to satisfy all of the plaintiff's
21 claims." And we submit that the answer to that question
22 is no, that the mere receipt of an offer without more
23 cannot possibly moot a case.

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

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

4 MR. KATYAL: And --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 MR. KATYAL: Justice Scalia, we think that
23 the Congress has answered that question at least in
24 216(b) by providing for both the opportunity to file a
25 complaint on her own behalf, as well as for those that

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

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

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

22 MR. KATYAL: Exactly.

23 JUSTICE SOTOMAYOR: All right.

24 MR. KATYAL: That's precisely right.

25 JUSTICE SOTOMAYOR: Let's go from there, at

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

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

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

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

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

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

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

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

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

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

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

16 MR. KATYAL: Your Honor, that is what we
17 did. We asked the district court right after the Rule
18 68 offer expired, within 4 days, to say: Please set up
19 a class certification process. And that process was
20 then interrupted by their subsequent motion after the
21 Rule 68 offer had expired to say: This case is moot.

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

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

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

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

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

1 for class certification."

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

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

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

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

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

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

11 JUSTICE BREYER: Well, why? Why?

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

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

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

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

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

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

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

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

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

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

22 JUSTICE SCALIA: I know you do.

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

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

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

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

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

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

25 MR. KATYAL: We think that it is a

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

4 Here -- here is what he said. This is at
5 445 U.S. 341. "The distinguishing feature here is that
6 the Defendant has made an unaccepted offer. The action
7 is moot in the Article III sense only if this Court
8 adopts a rule an individual seeking to proceed as class
9 representative is required to accept a tender of only
10 his individual claims...acceptance need not be mandated
11 under our precedents since the Defendant has not offered
12 all that has been requested in the complaint (i.e.,
13 relief for the class), and any other rule...would make
14 the questions unreviewable."

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

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

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

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

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

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

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

22 MR. KATYAL: Sure.

23 JUSTICE ALITO: Should I -- yes.

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

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

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

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

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

25 JUSTICE SOTOMAYOR: -- to get the point --

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

3 MR. KATYAL: Oh, absolutely, Justice
4 Sotomayor.

5 JUSTICE SOTOMAYOR: And what you're
6 saying --

7 MR. KATYAL: We were proceeding on the
8 hypothetical.

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

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

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

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 We'll hear from Mr. Yang now.

22 ORAL ARGUMENT OF ANTHONY A. YANG,
23 FOR UNITED STATES, AS AMICUS CURIAE,
24 SUPPORTING RESPONDENT

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

1 please the Court:

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

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

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

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

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

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

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

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

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

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

13 JUSTICE BREYER: Now we have a case if the
14 employer for some reason, a mistake in bookkeeping or
15 something, didn't send the check on time, so it arrived
16 3 days late. And he says: Ha, I'm not cashing the
17 check; now I can sue him. Right? That's your theory.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 satisfaction and says that there is no merits claim --

2 CHIEF JUSTICE ROBERTS: Yes.

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

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

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

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

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

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

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

1 eliminate the past injury?

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

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

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

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

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

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

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

1 people to settle their disputes through offers of
2 judgment.

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

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

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

16 MR. YANG: Right.

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

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

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

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

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

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

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

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

10 MR. YANG: May I answer the question?

11 CHIEF JUSTICE ROBERTS: Certainly.

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

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 MR. YANG: Thank you.

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

24 REBUTTAL ARGUMENT OF RONALD MANN

25 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

25 JUSTICE BREYER: All right. That's true.

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

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

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

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

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

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

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

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

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

21 And so I don't --

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

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

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

4 MR. MANN: But it is --

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

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

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

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

1 didn't engage in our conduct any longer.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 The case is submitted.

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

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