No. 11-1059

IN THE

Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORP.,
Petitioners,

v.

LAURA SYMCZYK,
Respondent.

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

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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ARGUMENT

The petition presents a single overarching legal principle – Article III at all times requires a live controversy with an interested plaintiff. That principle provides straightforward answers to all of the relevant cases: when the named plaintiff in a representative action loses a cognizable interest in the case, the litigation ordinarily becomes moot. The only exception is in cases, like *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), in which the case already involves interests of other parties in a tangible way. Pet. 8-14. This case is the easiest one, in which mootness is most plain, because the lone

plaintiff lost any interest in the case before any other parties had joined the litigation or otherwise attained any interest in it. Pet. 8-9.

Respondent's brief in opposition, by contrast, conspicuously omits any analysis of justiciable controversies or the cognizable interests of identifiable individual plaintiffs. Rather, diverting the Court's attention from that central weakness of the decision below, respondent seeks to make order out of the disarray in the existing courts of appeals decisions. Br. in Opp. 7-16. The distorted analysis necessary for respondent to reconcile the varied reasoning in the extant circuit decisions only buttresses the petition's claim that the problem warrants this Court's attention.

1. Respondent's analytical tack is to divide the various appellate decisions discussed in the petition into distinct categories and subcategories, claiming that this justifies ignoring disparate reasoning in the different categories. Br. in Opp. 7-15 (responding to Pet. 14-22). The fundamental difficulty that respondent cannot evade is that the distinctions she advances to justify the differing mootness determinations rest on factual attributes of the cases that have no plausible connection to any coherent doctrine of justiciability.

a. Respondent first discusses the cases involving the Fair Labor Standards Act ("FLSA"), and argues (Br. in Opp. 7-12) that there is no circuit split in those cases alone. Within that group of cases, respondent contends that the relevant distinguishing fact is that the plaintiffs in this case and *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913 (CA5 2008), lost their justiciable interest in the dispute because of an offer of judgment under Fed. R. Civ. P. 68.

Conversely, respondent emphasizes, the plaintiffs in *Cameron-Grant v. Maxim Healthcare Services, Inc.*, 347 F.3d 1240 (CA11 2003), and *Smith v. T-Mobile USA Inc.*, 570 F.3d 1119 (CA9 2009), settled voluntarily. Thus, respondent argues, this case and *Sandoz* hold that the absence of an interested plaintiff does not moot the case if the mootness comes from an offer of full relief, while *Cameron-Grant* and *Smith* hold that the absence of an interested plaintiff does moot a case, at least if the mootness comes from a voluntary settlement.

But respondent never explains *why* the manner in which a plaintiff loses its interest should resolve the constitutional question. To be sure, respondent does rest on the policy concern expressed in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), that an overbroad application of mootness doctrine would allow defendants to "pic[k] off" the plaintiffs in a representative action too easily (445 U.S. at 339). Untethered from the factual moorings of *Roper*, however, that general concern provides no basis for the decision below. As the petition explains (Pet. 8-14), the Constitution does not extend the federal judicial power to cases in which no plaintiff has an interest. The closely divided decisions in *Roper* and *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), respect that limitation, because in each case, the Court held, the plaintiff whose individual interest was moot had a representative relationship to other class members that was enough to sustain Article III justiciability. *See* Pet. 11-12.

Respondent repeatedly emphasizes (Br. in Opp. 6, 11) the discussion in *Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975). But *Sosna* is even less relevant in this context than *Roper* and *Geraghty*. Because the

district court in *Sosna* had certified a class action before the named representative lost an interest in the case, the controversy at every moment involved a plaintiff directly interested in the dispute. *See* 419 U.S. at 399 (noting that "the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant" "[w]hen the District Court certified the propriety of the class action"). As the *Sosna* Court emphasized, with a vigor that has escaped the notice of the courts of appeals:

> There must not only be a named plaintiff who has such a case or controversy at the time the complaint is filed, and at the time the class action is certified * * * but there must be a live controversy at the time this Court reviews the case. The controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot.

419 U.S. at 402 (internal citation omitted).

The distinction between a voluntary settlement and an offer of judgment under Rule 68 has no logical relation to the nature of the relationship between absent third parties and the present, but disinterested, plaintiff.[1] And thus, respondent's reliance on

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[1] Indeed, if concerns about the propriety of settlements were relevant, they favor Rule 68 offers as a way to resolve litigation. A Rule 68 offer, after all, is effective only if a defendant offers everything sought in the complaint – a distant echo of a typical voluntary settlement, in which a plaintiff ordinarily compromises its claims to accept something far less than full relief. *See Roper*, 445 U.S. at 349 n.6 (Powell, J., dissenting) ("We may assume that respondents had some interest in the class-action

Rule 68 as the key to understanding the lower court decisions shows exactly where the lower courts have lost their way: in failing to ask whether it makes any sense to extend the decisions in *Sosna*, *Roper*, and *Geraghty* to a factual context (the FLSA) in which the dissipation of the interest of the named plaintiff leaves no identifiable individual with any interest in the case. To the extent FLSA cases are a distinct category, the relevant question they raise is not when a Rule 68 offer vitiates the mootness ramifications of a settlement (a question partially addressed by *Roper*). The key question (evaded by respondent, and never yet addressed by this Court) is whether it makes sense to extend *Roper* and *Geraghty*'s treatment of mootness in class actions to a context like the FLSA in which the individual plaintiff has no representative relationship to the absent parties. *See* Pet. 9-11.

b. Turning to respondent's second category, cases under Fed. R. Civ. P. 23, respondent must strain even more to reconcile the inconsistencies (Br. in Opp. 12-15). Respondent's primary strategy is to subdivide the Rule 23 cases. First, respondent considers Rule 23 cases involving voluntary settlements, repeating the argument that cases involving Rule 68 offers of judgment are fundamentally different from cases involving voluntary settlements. For the cases involving voluntary settlements, respondent candidly acknowledges the "disagreement among the circuits over the question of whether a voluntary settlement or dismissal of the named plaintiff's claims prior to

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procedure as a means of interesting their lawyers in the case or obtaining a satisfactory settlement * * * , but once respondents obtained both access to court and full individual relief that interest disappeared.").

class certification renders the question moot," but tries to sweep that problem under the rug as one "not presented here." Br. in Opp. 13.

Respondent then turns to her second subcategory, Rule 23 cases that involve offers of judgment. Here, respondent is particularly hard pressed to dispose of the Seventh Circuit's decision in *Damasco v. Clearwire Corp.*, 662 F.3d 891 (CA7 2011). As summarized in the petition, *Damasco* explicitly rejects contrary decisions of the Third, Fifth, Ninth, and Tenth Circuits. *See* Pet. 20 (discussing *Damasco*, 662 F.3d at 895). The only explanation respondent can provide for *Damasco* is that the offer of judgment in that case was made under a state procedural analogue to Rule 68. But if the distinction between voluntary settlements and offers of complete relief seems irrelevant to mootness doctrine, it is even harder to find a relevant distinction between state and federal procedures assessing the completeness of the offered relief. In either case, the mootness comes not from the procedural rule under which the offer is made, but from the cessation of the plaintiff's interest in the case that flows from the defendant's willingness to provide full relief. The need to articulate such a fanciful boundary for the Constitutional judicial power shows the need for redirection from this Court.

* * * * *

Respondent's exertions to reconcile the existing body of court of appeals decisions underscore the central thrust of the petition: as representative litigation has grown in the three decades since *Roper* and *Geraghty*, the lower courts have lost sight of the constitutional boundaries those decisions observed. Instead of identifying individual controversies as a

basis for justiciability, the courts have become preoccupied with the importance of enhancing the effectiveness of representative litigation as an enforcement mechanism. Only this Court can remind the courts of appeals, collectively, to confine their pursuit of such policy goals within the limitations of Article III.

2. Despite the proliferation of categories respondent proposes, respondent does not challenge the petition's demonstration (Pet. 14-22) that the decisions of the courts of appeals conflict along various fault lines. So, for example, respondent concedes (Br. in Opp. 12-15) a direct conflict between decisions of the Fourth and Eighth Circuits (holding that settlement before certification renders a case moot)[2] and decisions of the Third, Ninth, and Tenth Circuits (holding that certification after settlement can vitiate mootness by "relation back" to the complaint).[3] Similarly, respondent acknowledges (Br. in Opp. 14-15) the "tension" between the decision of the Seventh Circuit in *Damasco* (holding that an offer of judgment before a motion for certification rendered a case moot) and the decisions of the courts of appeals that follow the relation-back doctrine the Third Circuit articulated in *Weiss v. Regal Collections*, 385 F.3d 337 (2004). It is important to emphasize what those two conflicts

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[2] *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88 (CA4 2011); *Anderson v. CNH U.S. Pension Plan*, 515 F.3d 823 (CA8 2008).

[3] *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (CA9 2011); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239 (CA10 2011); *Weiss v. Regal Collections*, 385 F.3d 337 (CA3 2004); *see also Russell v. United States*, 661 F.3d 1371, 1376-78 (CAFed 2011) (following *Pitts* in case applying law of the Ninth Circuit).

illustrate: whether the cases involve Rule 68 offers of judgment or voluntary settlements, there are courts of appeals on both side of the matter. Thus, even accepting respondent's scheme of categories, the difference between voluntary settlements and offers of relief is not enough to reconcile the decisions of the courts of appeals.

More broadly, respondent's unconsidered reliance on *Roper* and *Geraghty* exposes the internal incoherence of the brief in opposition. On the one hand, to minimize the disarray in existing decisions, respondent must assert that the tension between the decision below and decisions like *Damasco* and *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88 (CA4 2011), is irrelevant. To that end, respondent emphasizes (Br. in Opp. 13-15) that *Damasco* and *Rhodes* involve Rule 23 rather than the FLSA. At the same time, needing a doctrinal justification for the decision below, respondent portrays this case and *Sandoz* as straightforward applications of the rules *Roper* and *Geraghty* developed in the early days of Rule 23. But respondent cannot say that Rule 23 decisions are irrelevant for purposes of assessing conflicts with FLSA decisions, while at the same time justifying the FLSA decision below as a straightforward application of the law under Rule 23.

The central weakness of respondent's argument lies in the substance of the difference between Rule 23 and the FLSA. Respondent is correct to suggest that FLSA cases differ in important ways from cases under Rule 23, but those differences make it markedly *less* appropriate to rely in the FLSA context on the interests of absent individuals as a barrier to mootness. Under the FLSA, absent parties have no justiciable relation to the controversy unless and

until they affirmatively join the case. *See Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 175-76 (1989) (Scalia, J., dissenting)[4]; *see* Pet. 9-11 (detailed discussion of the difference between collective actions under the FLSA and class actions under Rule 23). Thus, it should be *harder*, not *easier*, to justify a finding of justiciability in no-plaintiff FLSA cases. In any coherent regime, a finding of mootness in this case would follow *a fortiori* from cases like *Damasco* and *Rhodes*.

In the end, respondent cannot deny the disarray in the courts of appeals. Even within the narrowest category of FLSA cases, respondent effectively concedes that the Eleventh and Ninth Circuits would approach this case differently than the Third and Fifth Circuits. Br. in Opp. 10-11 (explaining that "the difference between *Sandoz* and *Cameron-Grant/Smith* is that *Sandoz* proceeded to discuss the relation back doctrine, whereas *Cameron-Grant* and *Smith* did not"). As the petition explains in detail (Pet. 18-19), the Ninth and Eleventh Circuits require dismissal of FLSA cases when the only party to the case has no further interest; the willingness of the Third and Fifth Circuits to consider other justifications for keeping the case alive without a plaintiff is precisely the issue that cries out for review.

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The courts of appeals have gone far beyond developing slightly differing formulations to approach a complex problem. In the last year, the courts of

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[4] In this regard, it is important to note that the relevant FLSA provision does not provide for injunctive relief (*see* Pet. 9 n.1). There is accordingly no possibility that relief for the named plaintiff will benefit absent non-parties.

appeals that reject the relation-back doctrine have repeatedly acknowledged and rejected the conflicting views of other courts and made it clear that they will not retreat absent intervention by this Court. *Rhodes*, 636 F.3d at 100; *Damasco*, 662 F.3d at 895. Further percolation will not resolve the disagreement.

3. The petition identifies two distinct areas in which the courts of appeals have struggled: whether *Roper* should be extended to FLSA cases; and how far a case must proceed toward certification for *Roper* to apply. Respondent argues (Br. in Opp. 15-17) that this case is a poor vehicle because it presents both of those problems. Respondent accurately notes that the Court would not be in a position to reverse the court of appeals on both of those points, but reasons from that premise to the conclusion that this case is a poor vehicle. That argument is specious.

If the Court takes a single case that presents only one of the two issues, it could address only that issue, and necessarily would leave the other open.[5] Conversely, if it takes a case like this one, that presents both issues, there is at least the possibility that the Court could address both issues. On that point, the Court should note respondent's concession (in her

[5] In any event, despite the frequency with which the issue arises (decisions in 2011 from the Third, Fourth, Seventh, Ninth, Tenth, and Federal Circuits), this case appears to be the only case presently mature for the Court's consideration. The judgment of the Seventh Circuit in *Damasco*, *supra*, apparently became final last month when the plaintiff did not file a petition seeking review of that decision. *See Damasco v. Clearwire Corp.*, No. 11A-902 (Mar. 23, 2012) (Kagan, Circuit J.) (granting an extension of time to May 3, 2012, within which to seek review of the Seventh Circuit's decision in *Damasco*).

formulation of the question presented) that petitioners' offer "provided complete relief on her individual claims." That concession perfects the factual setting necessary for the legal questions raised by the petition; the Court need not fear factual complications that would muddy plenary review.

Moreover, even if the Court reached only the FLSA problem, the rapidly burgeoning litigation under that statute makes the problem independently worthy of review. *See* Amicus Br. of Chamber of Commerce et al. 16-21. Similarly, the importance of uniform and reliable rules for settling class actions is self evident, in a world in which plaintiffs are free to choose the forum in which they file and in which settlement is so much cheaper than full-blown litigation. *See* Pet. 23-24. In an area of frequent litigation and acknowledged disarray, unaddressed by the Court for three decades, the likelihood that the Court could not settle all of the problems with any single case is not a persuasive reason to pass on a clean chance to provide timely guidance on some of the issues.

Respondent closes with the disingenuous suggestion that the arguments in the petition are grounded only in policy, and specifically that they rest on a distaste for the "sound judicial administration" respondent perceives as supporting the decision below (Br. in Opp. 17). Nothing is further from the truth. The petition disclaims any argument about the social value of the system of litigation contemplated by the court below and by the panels in *Weiss* and *Sandoz*. Indeed, it is conceivable that policymakers might prefer to leave the task of statutory enforcement to private law firms entirely free from the need to locate individual clients. That is not, however, a system in

which Article III permits the federal judiciary to participate.

* * * * *

In sum, the confusion about the justiciability of collective litigation when the plaintiff receives full relief rests entirely on the courts' conflicting understandings of this Court's opinion in *Roper*. Only this Court can provide a single binding explication of that opinion that will guide the decisions of the courts of appeals back into uniform compliance with the Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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