No. 11-1059

IN THE

Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORP.,
Petitioners,
v.
LAURA SYMCZYK,
Respondent.

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

BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION, NATIONAL WOMEN'S LAW CENTER, CHANGE TO WIN, NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, NATIONAL CONSUMER LEAGUE AND NATIONAL CONSUMER VOICE FOR LONG TERM CARE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICI

Amici curiae submit this brief, with the consent of the parties,[1] on behalf of the Service Employees International Union, the National Women's Law Center, Change to Win, the National Consumer Voice for Quality Long Term Care, the National Consumers League, and the National Partnership for Women & Families. *Amici* are labor organizations (including the largest healthcare union in the United States, representing approximately 160,000 nursing home workers of which almost 5,000 are employees of petitioner Genesis Healthcare), women's advocacy organizations, and consumer groups that advocate for the rights of nursing home residents and their families. Together *amici curiae* have a strong interest in meaningful enforcement of labor and employment laws and a particular interest in the enforcement of these laws in the nursing home industry.

Nursing home workers are a poorly paid, overwhelmingly female workforce whose wage and hour rights are routinely violated. These violations harm not only workers, but also the nursing home residents for whom they care, because when nursing homes reduce staffing levels by evading overtime protections, they heighten the danger of accidents and mistakes caused by worker fatigue that imperil residents. Ensuring that nursing home workers can assert their wage and hour rights in court thus benefits both workers and the nursing home residents for whom they care.

[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

More detailed descriptions of each of the *amici* appear in the Appendix.

INTRODUCTION AND SUMMARY

Laura Symczyk worked as a registered nurse at a nursing home owned and operated by Genesis Healthcare Corporation in Philadelphia, Pennsylvania. Complaint at ¶ 12, *Symczyk v. Genesis Healthcare Corp.*, No. 09-cv-05782, 2010 WL 2038676 (E.D. Pa. May 19, 2010), *rev'd*, 656 F.3d 189 (3d Cir. 2011), *cert. granted*, 80 U.S.L.W. 3512 (U.S. June 25, 2012) (No. 11-1059). She filed this case under the Fair Labor Standards Act ("FLSA"), on behalf of herself and all other similarly situated employees, alleging that her employer Genesis Healthcare Corporation violated the FLSA through its policy of deducting thirty minutes for meal breaks from employees' pay regardless of whether employees performed compensable work during meal breaks. *Id.* at ¶ 1. Ms. Symczyk identified those similarly situated as "all non-exempt employees" subject to this policy, including secretaries, housekeepers, custodians, clerks, porters, registered nurses, respiratory therapists, administrative assistants, nurses' aides, quality coordinators, operating room coordinators, medical coders, medical underwriters and others. *Id.* at ¶ 14. Genesis Healthcare Corporation owns over 200 nursing homes, with over 25,000 beds in thirteen states, and employs over 50,000 workers. *See* Meg LaPorte, *2012 Top 50 Largest Nursing Facility Companies*, Provider Magazine (Jun. 1, 2012), http://www.providermagazine.com/reports/Documents/2012/0612_Top50.pdf; Genesis HealthCare, http://www.genesishcc.com/about-us (last visited Oct. 24, 2012).

Nursing home workers like those on behalf of whom Ms. Symczyk brought suit are predominantly women earning near poverty-level wages. Wage and hour violations are the norm in the nursing home industry. *See* DOL, *Annual Report Fiscal Year 2004*, *Performance and Accountability Report*, *Strategic Goal 2: A Secure Workplace* [hereinafter *Annual 2004 Report*]. This industry is also characterized by high turnover and poor working conditions. *See* Jennifer R. Salmon et al., Florida Dept. of Elder Affairs, *Nurse Aide Turnover: Literature Review of Research*, *Policy and Practice* 1 (1999); Jeanne Geiger-Brown et al., *Demanding Work Schedules and Mental Health in Nursing Assistants Working in Nursing Homes*, 18 Work & Stress 292, 293-294 (2004). Moreover, these abuses of the nursing home industry workforce have been shown to correlate directly with poor patient care. *See*, *e.g.*, Amy Witkoski & Victoria Vaughan Dickson, *Hospital Staff Nurses' Work Hours*, *Meal Periods*, *and Rest Breaks*, 58 Am. Ass'n Occupational Health Nurses J. 489, 490 (2010) (fatigue from overwork correlated with diminished patient care). The extensive and well-documented wage and hour violations in the nursing home industry are typical of many industries employing high concentrations of low-wage workers, including garment factories, restaurants, construction, agriculture and poultry processing. Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 Vand. L. Rev. 727, 737 (2010) [hereinafter "*Facilitating*"]; Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 Am. U. L. Rev. 523, 560-61 (2012) (collecting

studies). A recent three-city study found 26% of low-wage workers surveyed were paid below minimum wage and 75% did not receive overtime pay they were due in the prior week. *See* Moss & Ruan, *supra*, at 561. The problem of wage theft is particularly acute for women workers, who make up about two-thirds of those earning minimum wages or less. NWLC calculations based on Bureau of Labor Statistics (BLS), *Characteristics of Minimum Wage Workers*, 2011, http://www.bls.gov/cps/minwage2011tbls.htm [hereinafter *BLS Min. Wage Characteristics*] (Table 1).

The FLSA was designed to protect these and other vulnerable workers from wage theft by their employers and give workers a mechanism to seek redress when it occurs. Nursing home workers and other low-wage workers need the FLSA to hold employers accountable. But collective actions are often the only means by which low-wage workers can prosecute violations of the FLSA. Low-wage workers are relatively unlikely to know the protections to which they are entitled and the process by which to enforce their rights; do not have the means to pay the upfront costs of hiring an attorney individually; and have real reason to fear for their jobs if acting alone in challenging their employers. By banding together through collective action, low-wage workers can efficiently achieve remedies for many harmed by an unlawful policy or practice through a single legal vehicle, enhance their ability to obtain legal representation, lower the financial and investigative burden for those in the class, and lessen the likelihood of retaliation against any individual employee.

Collective actions are critical not only to enforcement of the FLSA's wage and hour rules, but also to

protecting women from wide-scale pay discrimination under the Equal Pay Act, which is an amendment to the FLSA and which utilizes the same collective action mechanism. Through collective actions, low-wage women workers challenging pay discrimination can overcome these same barriers to individual litigation.

Genesis is asking this Court to rule that a Rule 68 offer of judgment to a named plaintiff prior to other plaintiffs opting into a collective action moots the case, even when the offer was made prior to notice of the action being sent to other potential plaintiffs and thus prior to other potential plaintiffs having a meaningful opportunity to join the suit.[2] Such a ruling would profoundly undermine the availability of collective actions and, in so doing, thwart the primary goal of the FLSA: protecting the most vulnerable workers from wage theft.

In this case, the district court granted Genesis' motion to dismiss for lack of subject matter jurisdiction, on the grounds that Genesis' rejected Rule 68 offer of judgment to Ms. Symczyk satisfied her individual claims and mooted the suit. *Symczyk*, 2010 WL 2038676, at *4. The Third Circuit correctly reversed on grounds that Genesis could not moot the collective action at this early stage by making a Rule 68 offer of judgment, reasoning that Ms. Symczyk should be provided an opportunity to

[2] Similar to the class action mechanism under Rule 23, under the FLSA, plaintiffs can bring a collective action on behalf of themselves and all other similarly situated employees, 29 U.S.C. § 216(b), but unlike a Rule 23 class action, in a collective action, putative members of the collective must "opt in" to participate in the suit. *See Hoffman-LaRoche v. Sperling*, 493 U.S. 165 (1989) (interpreting 216(b) in the context of the Age Discrimination and Employment Act); 7B Charles Alan Wright et al., *Federal Practice and Procedure* § 1807 (3d ed. 2012).

make a timely motion for class certification. 656 F.3d at 189. If and when she did so, the Third Circuit held, under the "relation-back" doctrine, the motion would be treated as if it had been made at the time the complaint was filed, thus saving the suit from mootness. *Id.* at 201.

The tactics Genesis employed—offering to settle with the plaintiff prior to notice being given to other plaintiffs, and then moving to dismiss the suit—are not unusual. In cases arising under the FLSA, defendants often seek to "pick[]-off" the named plaintiff prior to notice of the suit being sent to class members in attempts to stymie low-wage workers' ability to challenge company-wide wage theft. *Cf. Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) (describing defendants' attempts to "pick[] off" named plaintiffs in Rule 23 class action); Ruan, *Facilitating*, *supra*, at 736-740. A ruling by this Court that allows employers to moot a collective action by picking off the plaintiff early in the case would profoundly impair workers' ability to prosecute FLSA and EPA violations. Such a ruling would severely diminish the effectiveness of these statutes and run counter to Congress' purposes and intent. This Court should make clear that the law does not permit defendants to short circuit workers' ability to enforce their statutory rights in this manner.

ARGUMENT

I. PROTECTING LOW-WAGE WORKERS AND PROVIDING A FAIR MEANS FOR THEM TO VINDICATE THEIR RIGHTS ARE CORE PURPOSES OF THE FAIR LABOR STANDARDS ACT.

Enacted in 1938 at the height of the Great

Depression, the Fair Labor Standards Act was described by President Roosevelt as protecting "the fundamental interests of free labor and free people" by ensuring "only goods which have been produced under conditions which meet the minimum standards of free labor . . . be admitted to interstate commerce." H.Rep.No. 1452, 75th Cong., 1st Sess. (August 6, 1937) (statement of President Roosevelt). Prior to the FLSA, there was no minimum wage or premium pay for overtime work mandated by federal law, and employees were "at the mercy of their employer, with little leverage to improve their working conditions, while employers had few limitations on treatment of employees." *Examining Regulatory and Enforcement Actions Under the Fair Labor Standards Act: Hearing Before the Subcommittee on Workforce Protections*, *Committee on Education and the Workforce*, 112th Cong. 4 (2011) (statement of Rep. Lynn Woosley). The FLSA was "groundbreaking" and "helped millions of Americans improve their standard of living while providing for the appropriate level of balance between workers' rights and the rights of the employer." *Id.* at 4-5. It established a wage floor that would be "adequate to support life and a measure of human dignity." 134 Cong. Rec. S12688-02 (daily ed. Sept. 16, 1988). It also banned "oppressive working hours." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). The Act sent a powerful message that the United States would not condone "widespread unemployment or substandard living conditions for millions of [its] workers." *Fair Labor Standards Act Amendments of 1949*, *Subcomm. of the Comm.*

on Labor and Public Welfare, 81 Congr. 17 (April 11, 12, 13, 14, 18, 19, 20, 21, and 22, 1949) (statement of the Hon. Maurice J. Tobin, Secretary of Labor).

The Supreme Court has consistently recognized the FLSA's motivating purpose of providing critical protections to vulnerable workers and interpreted the FLSA consistent with this purpose. Echoing President Roosevelt, the Court described the Act as intended "to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1945) (citing 81 Cong. Rec. 7652, 7672, 7885; 82 Cong. Rec. 1386, 1395, 1491, 1505, 1507; 83 Cong. Rec. 7283, 7298, 9260, 9265; H. Rep. No. 75-1452, at 9 (1937); S. Rep. No. 75-884, at 3, 4 (1937)); *see also D.A. Schulte, Inc., v. Gangi*, 328 U.S. 108, 116 (1946) (touchstone of the Act was "to secure for the lowest paid segment of the nation's workers a subsistence wage"). The Court also heralded the law as "remedial and humanitarian in purpose" because it dealt not with "mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others." *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944). Commensurate with this understanding, the Court has "consistently construed the Act . . . to the furthest reaches consistent with congressional direction.'" *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207 (1959).

II. NURSING HOME WORKERS EPITOMIZE THE VULNERABLE WORKERS THE FAIR LABOR STANDARDS ACT WAS DESIGNED TO PROTECT.

A. Nursing Home Workers Earn Low Wages and Have Little Bargaining Power.

Nursing home workers, on behalf of whom this case was filed, are precisely the kind of workers who are especially vulnerable to exploitation and whom the FLSA was designed to protect. Recognizing this, Congress amended the FLSA in 1961 specifically to expand coverage to hospitals and nursing homes. During the hearing on the amendment, the American Nurses' Association ("ANA") testified that by "any measure," these employees were "ill paid," effectively converted into "involuntary philanthropists" by their substandard wages, and badly in need of the FLSA's protections. *Minimum Wage-Hour Legislation: Hearing Before the General Subcommittee on Labor of the H. Comm. on Education and Labor*, 88th Cong. 620-625 (1964) (statement of Dolores LeHoty, Director of the Economic Security Program of the American Nurses Association). Today, the nursing home workforce continues to be impoverished and in need of protection. Low wages and persistent occupational gender segregation remain signature characteristics of the nursing care facilities industry. Indeed, eight of the ten most common occupations in nursing care facilities pay median hourly wages between $9.23 and $11.42. Bureau of Labor Statistics (BLS), Occupational Employment Statistics (OES), *May 2011 National Industry-Specific Occupational Employment and Wage Estimates: NAICS 623100 - Nursing Care*

Facilities, http://www. bls.gov/oes/current/naics4_623100.htm (last modified Mar. 27, 2012) [hereinafter *Nursing Care Facilities*]. In comparison, a full-time, year-round worker supporting a family of four would have to earn at least $11.40 per hour to bring her family above the poverty threshold. National Women's Law Center calculations from U.S. Census Bureau, Current Population Survey (CPS), 2012 Annual Social and Economic Supplement, Table 35, http://www. census.gov/hhes/www/cpstables/032012/pov/toc.htm. Among the ten most common occupations in nursing care facilities, only two—licensed practical and vocational nurses and registered nurses—earn higher median wages, at $20.40 and $28.24 per hour, respectively. BLS, *Nursing Care Facilities*, *supra*.

The largest segment of nursing home workers are nursing aides, orderlies, and attendants. Audrey Watson, BLS, *Occupational Composition of the Elder Care Industries* 53, 63 (2005), http://www.bls.gov/oes/2005/may/elder.pdf. These workers make up 38% of the nursing care workforce and earn a median wage of $11.30 per hour. BLS, *Nursing Care Facilities*, *supra*. The overwhelming majority of these workers are women, and most have little education. For example, 92% of certified nursing assistants are women and 75% have a high school diploma or less. Centers for Disease Control and Prevention, *National Nursing Assistant Survey 2004-2005*, Table 24. Data also show that women make up the vast majority of workers in those occupational categories that are most common in nursing homes. For example, some of the other common occupations in nursing homes include maids and housekeeping cleaners, nonrestaurant food servers, and laundry and dry-cleaning workers. All of these

occupations are heavily female: 89% of maids and housekeeping cleaners are women; 68% of nonrestaurant food servers are women; and 61% of laundry and dry-cleaning workers are women. BLS, *Labor Force Statistics from the Current Population Survey: CPS, 2011 Annual Averages*, Table 11, http://www.bls.gov/cps/tables.htm#annual (last modified Jul. 6, 2012). In addition, all of these occupations pay very low wages—between $399 and $419 in median weekly earnings for full-time workers. *Id.* at Table 39.

The nursing home industry is not an anomaly among female-dominated industries; low wages are common for women workers, and especially common for women in female-dominated occupations and industries. Although women make up less than half of the overall American workforce, they account for about two-thirds of those making minimum wage or less. Rebecca Thiess, *The Future of Work, Trends and Challenges for Low-Wage Workers*, Economic Policy Institute 4 (2012); BLS, *Min. Wage Characteristics*, *supra*, at Table 1. In general, there is a negative relationship between the proportion of women in a particular job category and the average earnings for workers in that job. *See* Ariane Hegewisch et al., *Separate and Not Equal? Gender Segregation in the Labor Market and the Gender Wage Gap* (2010), *available at* http://www.iwpr.org/publications/pubs/separate-and-not-equal-gender-segregation-in-the-labor-market-and-the-gender-wage-gap. For example, among all "low-skilled" workers, women in female-dominated occupations earn 73.8% of the median weekly earnings of men in male-dominated occupations. *Id.* at 11.

When nursing home workers and other low-wage

women workers are victims of wage theft, their low wages often make it prohibitively difficult for them to seek redress. Obtaining legal representation to prosecute an individual claim is simply unaffordable for most low-wage workers. Further, because of their low wages, the risk of retaliation in the form of job loss poses a much greater threat to these workers than to higher-wage workers who are more likely to have a cushion to fall back on in the event they are fired. Finally, less educated workers are less likely to bring suit to enforce their workplace rights, perhaps because they "may have [less] information about where and how to file a charge" or "may not feel as adept at exercising their rights as the highly educated group." Michele M. Hoyman & Lamont E. Stallworth, *Who Files Suits and Why: An Empirical Portrait of the Litigious Worker*, 128 U. Ill. L. Rev. 127, 128 (1981).

B. High Turnover Rates in the Nursing Home Industry Make It Even More Difficult for Nursing Home Workers to Enforce Their Workplace Rights.

For nursing home workers, the difficulty in asserting and enforcing their rights is compounded by the extraordinarily high turnover rate in the nursing home industry. Historically, "nursing homes have [had] higher turnover rates for all staff categories" than any other industry in the service sector. Salmon et al., *supra*, at 1. A review of 87 studies of nursing home staffing levels conducted between 1975 and 2003 found average annual turnover rates ranging from 40% to 190%. Jane E. Bostick et al., *Systematic Review of Studies of Staffing and Quality in Nursing Homes*, 7 J. Am. Med. Directors Ass'n, 366, 372 (2006). The American

Health Care Association (AHCA) reported that in 2010, "the turnover rate for all nursing facility employees was 35.1 percent." American Health Care Association, *Report of Findings: Nursing Facility Staffing Survey 2010*, 3 (2011). The turnover rate was especially high among nursing care staff. *Id.*

The high turnover rates in nursing homes are partly a function of low wages and benefits and partly a function of extremely high rates of injury. *See Nursing Staff in Hospitals and Nursing Homes: Is It Adequate?* 161, 174 (Gooloo S. Wunderlich et al. eds., 1996). OSHA reported that "[i]n 2010, nursing homes and personal care facilities had one of the highest rates of injury and illness among industries for which lost workday injury and illness (LWDII) rates are calculated." Occupational Safety and Health Administration, *Nursing Homes and Personal Care Facilitie*s, *available at* http://www.osha.gov/SLTC/nursinghome/index. html (last visited Oct. 24, 2012); *see also* Douglas Myers et al., *Predictors of Shoulder and Back Injuries in Nursing Home Workers: A Prospective Study*, 41 Am. J. Indus. Med. 466, 466 (2002) ("Nursing home workers, particularly [nursing assistants], have among the highest rates of back and shoulder injuries in the US as well as in other countries"). High injury rates contribute to an insidious cycle in which injuries lead to turnover, a thinner staff is then overworked, resulting in more turnover, which leads to more injuries. *See* Geiger-Brown et al., *supra*, at 293-294.

The result is a workforce that frequently shifts from employer to employer. Because nursing home workers often have a short tenure at their jobs and because their wages are low, their potential FLSA claims are

likely to be small in absolute terms, even if the losses are significant to the worker, making it extremely difficult for workers to pursue individual claims. Moreover, because these workers do not stay at one job long, they may be less likely to conclude that the cost and effort of seeking to enforce their workplace rights will pay off in the long run.

C. Rampant Wage Theft Is Common in the Nursing Home Industry.

Perhaps because nursing home workers tend to be particularly vulnerable in these ways, the Department of Labor reports that an astounding 45% of nursing homes were noncompliant with FLSA requirements in 2004, and 60% were noncompliant in 2000. *See* DOL, *Annual 2004 Report*, *supra*; *see also* DOL, Wage and Hour Division, *Nursing Home 2000 Compliance Survey Fact Sheet* [hereinafter *2000 Survey*]. The Department of Labor's 2000 survey of 136 nursing homes found that "over $432,000 in minimum wage and overtime back wages were . . . due 1,576 employees." DOL, *2000 Survey*, *supra*.

Noncompliance with the FLSA in the nursing home industry often takes the form of denying workers earned overtime. High turnover and injury rates, as well as employer efforts to boost profits, have led to chronic understaffing. A 2001 study commissioned for Congress found that 97% of nursing homes maintained sub-optimal staffing levels. *See* Marvin Feuerberg, Centers for Medicare and Medicaid Services, *Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes Report to Congress: Phase II Final* 5 (2001). Based on an analysis of data collected by government agencies between 2000 and 2006, *The New*

York Times reported that "at 60 percent of homes bought by large private equity groups from 2000 to 2006, managers have cut the number of clinical registered nurses, sometimes far below levels required by law." Charles Duhigg, *At Many Homes, More Profit and Less Nursing*, New York Times, 3 (Sept. 23, 2007). Professor Charlene Harrington, who has studied the nursing home industry extensively, observed "[t]he first thing owners do is lay off nurses and other staff that are essential to keeping patients safe . . . . [C]hains have made a lot of money by cutting nurses, but it's at the cost of human lives." *Id.* Harrington's research showed that "nurse staffing was lower at investor-owned nursing homes for each occupational category." Charlene Harrington et al., *Does Investor Ownership of Nursing Homes Compromise the Quality of Care?*, 91 Am. J. Pub. Health 1452, 1453 (2001).

The combination of understaffing and high turnover forces existing staff to work overtime. *See* Kerry Hannon, *Eric Carlson: On Elder Care – and Elder Law*, USNEWS.com (Mar. 11, 2009). Understaffing has "forced workers into working longer shifts and work weeks, with fewer and shorter breaks, more weekends, and more rotating shifts to provide adequate coverage." Geiger-Brown, *supra*, at 293. But employers have largely failed to pay their workers for their additional time. A DOL survey of nursing homes conducted in 2000 revealed that "eighty-four percent (84%) of [nursing home] employers found in violation of the FLSA violated the overtime regulations." DOL, *2000 Survey*, *supra*. Among the four most common types of FLSA violations the DOL found in nursing homes was "Employee Paid Straight Time for Overtime Hours Worked." *Id.* The DOL surveys leave no doubt

that wage theft in the form of unpaid overtime is rampant in the nursing home industry and that the industry is in dire need of heightened enforcement.

Nursing home employers like Genesis also frequently violate the FLSA by failing to compensate their employees for all hours worked—the violation alleged in this case. Two of the four most common FLSA violations the DOL found in its 2000 survey were: "Improper Calculation of Regular Rate of Pay" and "Failure to Compensate for All Hours Worked." *Id.* The DOL's 2009 Fact Sheet on nursing care facilities states:

> The most common violation in the nursing care industry is the failure of employers to pay for all the [h]ours worked. This uncompensated time most frequently occurs when employers fail to pay for work performed: Before and after a worker's scheduled shift; during an employee's scheduled meal period; and while employees are attending staff meetings and compensable training sessions.

DOL, *Fact Sheet #31: Nursing Care Facilities under the Fair Labor Standards Act* (2009), http://www.dol.gov/whd/regs/compliance/whdfs31.pdf. The AARP likewise reports, "[o]ften, nursing homes fail to pay all the wages earned by their nursing assistants. Common problems reported by nursing assistants include not being paid for work before and after their shifts, during meals, or for training sessions . . . ." Mary Ann Wilner & Ann Wyatt, Paraprofessional Healthcare Institute, *Paraprofessionals on the Front Lines: Improving their Jobs, Improving the Quality of Long-Term Care*, 1, 13 (1998), http://www.directcareclearinghouse.org/download/Paraprofessionals_on_the_Front_Lines_ExecSum.pdf.

While nursing home workers face rampant wage and hour violations, they are by no means unique among workers in low-wage jobs. In a 2009 three-city study of more than 4,300 low-wage workers, for example, two-thirds of workers reported pay violations in a given week, suffering an average of $2,600 in lost wages per year, an amount equal to 15% of the average annual income to which they were entitled. Annette Bernhardt et al., *Broken Laws*, *Unprotected Workers*, 5 (2009), *available at* http://www.nelp.org/page/broken-laws/BrokenLawsReport2009.pdf?nocdn= [hereinafter *Broken Laws*]; *see also* Annette Bernhardt et al., *Working Without Laws: A Survey of Employment and Labor Law Violations in New York City* (2010), *available at* http://nelp.3cdn.net/ 990687e422dcf919d3_h6m6bf6ki.pdf. Absent meaningful enforcement mechanisms, in many instances the FLSA's protections are unavailable to nursing home workers and other low-wage workers.

D. Quality Patient Care in Nursing Homes Depends on Workers' Ability to Enforce Their Rights Under the FLSA

If the FLSA's enforcement mechanisms are rendered less effective, the wage and hour violations already common in the nursing home industry are likely to worsen. Lowering the risk of FLSA claims will allow overtime abuses to surge to even greater levels, as more nursing homes try to cut costs by requiring longer shifts with no overtime pay. Nursing homes will be even less likely to maintain adequate staffing levels. Because fatigued and overworked employees are more likely to make mistakes, this will ultimately result in a reduction in the quality of patient care.

Congress recognized the dangers faced by overworked employees in the language of the FLSA, stating that the Act was intended to address "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). Fatigue from working long hours significantly diminishes the quality of a worker's work. Fatigue "is strongly associated with cognitive, psychomotor, and behavioral impairment." Witkoski & Vaughan Dickson, *supra*, at 490. Any of these problems in the nursing home environment significantly impairs the quality of patient care.

After adjusting for hospital factors and patient-related risk factors, hospitals where employees worked an average of more than eight hours and forty-five minutes per day had nearly three times as many patient infections as those where the staff worked shorter shifts. Marianna Virtanen et al., *Work Hours, Work Stress, and Collaboration Among Ward Staff in Relation to Risk of Hospital-Associated Infection Among Patients*, 47 Med. Care 310, 315 (2009). Nurses are nearly twice as likely to make an error when working a shift of 8.5 to 12 hours as compared to a shift of up to 8.5 hours, and more than three times more likely to make an error when working a shift of 12.5 hours or more. Ann E. Rogers et al., *The Working Hours of Hospital Staff Nurses and Patient Safety*, Health Affairs, 202, 206 (2004). A review of more than 1.2 million workplace accidents found that accidents were significantly more likely to occur in the tenth working hour of the day and beyond, with accidents twice as likely to occur in the twelfth working hour than in any of the first nine hours. Kerstin Hänecke et al., *Accident Risk as a Function of Hour at Work and Time of Day*

as Determined from Accident Data and Exposure Models for the German Working Population, 24 Scandinavian J. Work, Env't & Health Supp. 3, 43, 45 (1998). Similarly, a review of more than 1,000 nursing homes in three states found that "[t]otal nursing hours per resident day were significantly associated with worker injury rates in nursing homes," and concluded that "[b]y improving staffing levels in nursing homes, both workers and residents will benefit." Alison M. Trinkoff et al., *Staffing and Worker Injury in Nursing Homes*, 95 Am. J. Pub. Health 1220, 1220, 1224 (2005).

When nursing homes reduce staffing levels by evading FLSA overtime protections, it harms both the workers and the residents. Permitting wage theft to go unchecked at even greater levels than it does today will compromise the well-being of workers and threaten the health of the nursing home residents who rely on nursing home staff for quality care.

III. COLLECTIVE ACTIONS ARE CENTRAL TO ACHIEVING THE PURPOSES OF THE FLSA

A. Congress Intended the Collective Action Mechanism to Be a Key Means for Achieving the FLSA's Purposes

Under Section 216(b) of the Fair Labor Standards Act, an employee may bring an action on behalf of "himself . . . and other employees similarly situated." 29 U.S.C. § 216(b). Employees who want to participate in the lawsuit must then file a written consent to become a party, *id.*, typically after the court has provided notice of the claims to potential class members, *see Hoffman-LaRoche*, 493 U.S. at 169-170. The collective

action mechanism has provided "an avenue of redress to a large group of underprivileged and underrepresented people and has been utilized widely in furthering the rights of minority and low-wage workers." Ruan, *Facilitating*, *supra*, at 730. Although Congress has modified the collective action mechanism over the years, *see generally* United States Statutes At Large, 80 Cong. Ch. 52, May 14, 1947, 61 Stat. 84 (now codified at 29 U.S.C. § 251), its intent to enable collective challenges under the FLSA has never wavered.

Because of the difficulty and expense of proceeding individually with small claims, and because companies committing wage and hour violations often commit them against groups of employees pursuant to company-wide policy, rather than only against an individual worker, effective private enforcement of the FLSA depends on the availability of collective actions. Eve H. Cervantes & L. Julius M. Turmun, *ABA Section of Labor and Employment Law*, *Introduction to Class Actions and Collective Actions*, 2-4, http://apps. americanbar.org/labor/lel-annualcle/08/materials/data/papers/119.pdf; *see also* Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low-Wage Workers*, Mich. St. L. Rev., 19 (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2159963&download=yes## [hereinafter *What's Left*] ("[W]hen alleging wage and hour violations, the same corporate policies, patterns, and practices usually affect multiple workers in a workplace, not just individuals."). In addition, the possibility of collective actions deters employers from committing wage theft in the first place, because of their potential magnitude and scope. Ruan, *What's Left*, *supra*, 19.

B. Collective Actions Alleviate the Costs, Burdens and Risks of Bringing Individual Claims that Prevent Most Low-Wage Workers from Challenging Wage Theft on Their Own.

Due to the costs and burdens of litigation, the size of individual recoveries and lack of information about their rights, low-wage working women like the nursing home workers in this case are unlikely to vindicate their rights under the FLSA unless they can do so in a collective action. In addition, individual litigants may reasonably fear retaliation, which is less likely to occur when workers proceed as a group to vindicate their rights. The availability of collective actions allows individual workers to overcome these barriers.

1. Collective actions allow low-wage workers to find legal representation to prosecute their relatively low dollar claims.

The collective action vehicle allows aggregation of small claims and makes it far more likely that workers will find legal representation. Additionally, once a collective action has been filed, other affected workers are more likely to be willing to prosecute their claims if they do not have to shoulder the personal burdens and costs of litigating an individual case.

Even when the money lost due to wage theft is a substantial percentage of a low-wage worker's income, the dollar amount of her claims will typically be low in comparison to the overall costs of litigation. Ms. Symczyk, for example, was offered $7,500 to resolve her claims in their entirety. Low-wage workers have been estimated to lose an average of $2,634 annually as

the result of wage and hour violations, and thus their individual FLSA claims are likely not to be worth substantially more than this. Bernhardt et al., *Broken Laws*, *supra*, at 5. This is especially true in industries that have high rates of employee turnover, like the nursing home industry, as short job spells with one employer further lower individual FLSA claims.

The low dollar amount of FLSA claims can make it prohibitively difficult for individual workers to find legal representation, particularly against large employers that have vast legal resources at their disposal. *See Chase v. AIMCO Props., L.P.*, 374 F. Supp. 2d 196, 198 (D.D.C. 2005) (concluding that without collective actions, very few plaintiffs could bring suits because "individual wage and hour claims might be too small in dollar terms to support a litigation effort"); Moss & Ruan, *supra*, at 562 ("[M]odest damages make most wage claims prohibitively costly to prosecute individually: an individual case worth a few thousand dollars is not worth the attorney time necessary for the required discovery and motions; it hardly is even worth the thousands of dollars in out-of-pocket costs for witness transcripts alone."). Additionally, individual litigation requires one plaintiff to shoulder the demands of the lawsuit, "including spending many hours assisting in the investigation of the claims." *See* Ruan, *What's Left*, *supra*, at 15. This significant investment of time and money is not possible for many low-wage workers. *Id.*

Although the Department of Labor's Wage and Hour Division ("WHD") prosecutes wage and hour claims, because of its extremely limited resources it is unable to assist the vast majority of workers affected by wage theft. Todd A. Palo, *Minimum Wage, Justifiably*

Unenforced?, 35 Seton Hall Legis. J. 36, 46 (2010). Indeed, the likelihood that a covered employer will be subject to an investigation by the WHD is less than .001 percent. David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Pol'y J. 59, 62 (2006). Private enforcement of the FLSA is thus necessary to achieving the statute's purposes.

Indeed, private attorneys play the primary role in enforcing the FLSA, which provides one-way fee-shifting to encourage them to vindicate the important societal interest in employees being fully compensated for their work. *See* 29 U.S.C. § 216(b); *see also* Ruan, *Facilitating*, *supra*, at 730. But without collective actions, plaintiffs' attorneys have "negligible incentives" to bring FLSA claims. Ruan, *Facilitating*, *supra*, at 738; *see also* Moss & Ruan, *supra*, at 562 ("A chance at statutory attorneys' fees provides insufficient incentive in individual cases, as the typically modest settlement amounts do not leave much for fees and courts routinely reduce even prevailing attorneys' fees."). Collective actions, on the other hand, "allow[] . . . plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources." *Hoffman-LaRoche*, 493 U.S. at 170; *see also Roper*, 445 U.S. at 338 (observing that class actions have played a great role "in vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost"). Collective actions permit low-wage workers to find legal representation.

2. Collective actions help ensure that low-wage workers will not be prevented from asserting their rights by a lack of information about employer practices or legal processes.

Low-wage workers are likely to be less educated than their higher-paid counterparts, and as a result less familiar with laws that protect them. They may be unaware that particular employer practices are a violation of federal law. In some instances, when employer pay calculations are opaque, they may even be unaware of an employer's policies and practices regarding pay. This problem is exacerbated by common workplace policies forbidding workers from discussing wages or salaries, which further obscure employer pay policies and practices. Indeed, in a recent survey, over 61 percent of private-sector workers reported that their employer either prohibited or discouraged discussion of wages. Ariane Hegewisch et al., Institute for Women's Policy Research, *Pay Secrecy and Wage Discrimination* (2011), http://www. iwpr.org/initiatives/pay-equity-and-discrimination/#publications.

Collective actions help ensure that workers' lack of information does not shield employers from liability. In collective actions only one worker needs to file a charge on behalf of others "similarly situated" in order to initiate this process for many other potentially affected workers. The process by which collective actions are certified, which typically includes notice to potential plaintiffs of the claims in the case, ensures that similarly situated workers receive the information about alleged employer violations of law that is necessary to enforcing their rights.

3. Collective actions help reduce the prospect of retaliation, which otherwise makes it extremely difficult for low-wage workers to enforce their rights.

Workers are often deterred from complaining about their employer's violations of law by a reasonable fear of retaliation by the employer. *See Crawford v. Metro. Gov't*, 555 U.S. 271, 279 (2009). This problem is especially serious for employees who wield little power in their workplace, such as low-wage female workers. *See* Deborah Brake, *The Function of Retaliation: Silencing Challengers and Preserving Existing Power Structures*, 90 Minn. L. Rev. 18, 36 (2005). The FLSA, like Title VII of the Civil Rights Act of 1964, contains an anti-retaliation provision, *see* 29 U.S.C. § 215(a)(3), but even in the face of explicit statutory protections, workers widely and accurately perceive that exercising their rights in the workplace carries a risk of being fired. David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Pol'y. J. 50, 83 (2006). Indeed, a comprehensive study recently found 43% of low-wage workers who complained about violations of their workplace rights were retaliated against, by being fired, suspended or threatened with reductions in hours or pay. Nantiya Ruan, *What's Left*, *supra*, at 16. Low-wage workers are particularly vulnerable to the threat of retaliation, both because they are more likely to live paycheck-to-paycheck and thus less able to absorb the impact of a job loss or reduced hours, and because employers often view them as easily replaceable.

Proceeding through collective actions makes retaliation less likely, as plaintiffs benefit from the safety that comes in numbers. *See e.g.*, *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999) (presuming that class members still working for the employer might be unwilling to sue individually for fear of retaliation); *Simmons v. City of Kansas City*, 129 F.R.D. 178, 180 (D. Kan. 1989) (certifying class of police officers challenging discrimination in part to minimize the likelihood of retaliation against individual class members). It is far more difficult for an employer to target a large number of workers standing together to challenge an employer practice than it is for an employer to retaliate against a worker standing alone. This protection from retaliation is important for all workers, but is critically important for low-wage workers.

IV. COLLECTIVE ACTIONS ARE CENTRAL TO ACHIEVING THE PURPOSES OF THE EQUAL PAY ACT.

A. Providing a Means for Women Workers to Address Wide- Scale Pay Discrimination Is a Core Purpose of the Equal Pay Act.

The Equal Pay Act of 1963 ("EPA") prohibits sex-based differences in pay between men and women working in the same establishment and performing jobs requiring "equal skill, effort and responsibility [. . .] under similar working conditions." 29 U.S.C. § 206(d). Congress passed the EPA as an amendment to the FLSA, to obviate "the need for a new bureaucratic structure to enforce equal pay legislation," and to take advantage of the fact that "compliance should be made

easier because both industry and labor have a long-established familiarity with existing fair labor standards provisions." H.R. Rep. No. 309, 88th Cong, 1st Sess. 2 (1963) (cited in Albert H. Ross and Frank V. McDermott, Jr. *The Equal Pay Act of 1963: A Decade of Enforcement*, 16 B.C. L. Rev. 1 (1974), *available at* http://lawdigitalcommons.bc.edu/bclr/vol16/iss1/1. The EPA incorporates the same collective action mechanism available to plaintiffs in FLSA lawsuits. *See* Wright et al., *supra*, at § 1807 (noting that EPA suits rely on the collective action provision of the FLSA).

The purpose of the EPA was to root out systemic, company-wide, and indeed society-wide, pay practices that discriminated against women. Congress was concerned with "what was perceived to be a serious and endemic problem of employment discrimination in private industry—the fact that the wage structure of 'many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.'" S. Rep. No. 176, 88th Cong., 1st Sess., 1 (1963). To address this problem, the EPA is "broadly remedial" and "should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve." *Corning Glass Works v. Brennan*, 417 U.S. 188, 208 (1974).

The collective action mechanism in 216(b) was the key means through which women could challenge pervasive company-wide discriminatory compensation structures typical of the American workplace at the time of the EPA's passage in 1963, and which still persist today. Although today women make up nearly half the workforce, the typical woman working full-time,

year-round earns only 77 cents for every dollar earned by her male counterpart. Carmen DeNavas et al., United States Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2010*, 5 (2011), http://www.census.gov/prod/2011pubs/p60-239.pdf. Research has shown that even when factors such as years of work experience, education level, occupation, industry, union status and race are taken into account, 41% of the wage gap remains unexplained. *Pay Equity in the Workplace, Committee on Senate Health, Education, Labor and Pensions*, 3/11/10 Cong. Testimony (Pg. Unavail. Online), 2010 WLNR 5079748 (Statement of Heather Boushey, Senior Economist at the Center for American Progress Action Fund) (citing study by Blau and Kahn).

B. Collective Actions Enable Women Workers to Learn About and Address Wide-Scale Compensation Discrimination.

Just as in wage and hour cases, collective actions allow women challenging pay discrimination to find legal representation that otherwise would be unavailable given the small absolute stakes of many individual pay discrimination cases. Additionally, just as in wage and hour cases, the collective action shields workers from the risk of retaliation to which they would otherwise be exposed. As the Supreme Court recently recognized, the "[f]ear of retaliation is the leading reason" why many victims of pay and other discrimination "stay silent." *Crawford*, 555 U.S. at 279.

Notice to potential plaintiffs that a collective action has been brought on their behalf under the Equal Pay

Act can also serve the crucial purpose of alerting workers to pay discrimination that they otherwise may have insufficient information to recognize. Employees frequently have little to no information about their coworkers' wages and salaries. Employer pay scales are often confidential, and, as noted above, in many workplaces, explicit rules forbid disclosure of pay. *See* H.R. Rep. No. 110-237, at 7 (2007) (House Report on the Lilly Ledbetter Fair Pay Act of 2007); Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 Berkeley J. Emp. & Lab. L. 167, 168, 171 (2004). Although such rules are prohibited under the National Labor Relations Act,[3] an estimated one-third of private sector employers prohibit employees from discussing pay with their coworkers. Bierman & Gely, *supra*, at 168. Pay secrecy makes it difficult for individual workers to identify wage discrimination.

In addition, pay discrimination often takes the form of higher raises to men, rather than denial of pay raises to women. "Having received a pay increase, the female employee is unlikely to discern at once that she has experienced an adverse employment decision." *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 650 (2007) (Ginsburg, J. dissenting), *super-*

[3] Discussion of wages is protected concerted activity under the NLRA. *See*, *e.g.*, *Cintas Corp. v. NLRB*, 482 F.3d 463, 465–466 (D.C. Cir. 2007); *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 534 (6th Cir. 2000); *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1511 (8th Cir. 1993); *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 66 (2d Cir. 1992); *NLRB. v. Brookshire Grocery Co.*, 919 F.2d 359, 363 (5th Cir. 1990); *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976).

seded by statute, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, codified at 42 U.S.C. § 2000e-5. As a result, those workers who are the victims of discrimination are less likely to notice and protest it. Collective actions help overcome these information barriers, by providing potential plaintiffs notice of possible pay discrimination.

V. PERMITTING STRATEGIC MOOTING OF COLLECTIVE ACTIONS WOULD CONTRAVENE THE PURPOSES OF THE FLSA AND THE EQUAL PAY ACT, IN CONFLICT WITH THIS COURT'S PRECEDENT.

Genesis' proposed rule—in which the defendant in an FLSA or EPA action can "pick off" the named plaintiff prior to certification and thereby moot the action—would encourage strategic gamesmanship by defendants, and sharply undermine the purposes of the FLSA and the EPA. Maintaining the integrity of the judicial process by preventing such manipulation and preserving access to the courts have always been key concerns for the Supreme Court when considering the question of mootness. *See Roper*, 445 U.S. at 340; *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000) (the Court's "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness"); *Bunting v. Mellen*, 541 U.S. 1019, 1021 (2004) (opinion of Stevens, J., respecting the denial of certiorari) (expressing a concern that in defendant's attempt to render a case moot, there is "the potential for gamesmanship").

As the Third, Fifth and Ninth Circuits have recognized, the interpretation of mootness that Genesis pro-

poses is tantamount to manipulation of the judicial process to circumvent the enforcement mechanisms that Congress intended to be central to worker's effectuation of their statutory rights. In the instant case, the Third Circuit observed that the defendant's rule "morphs" Rule 68 "into a tool for the strategic curtailment of representative actions"—an "outcome antithetical to the purposes behind § 216(b)." *Symczyk v. Genesis Healthcare Corp.*, 656 F.3d 189, 200 (3d Cir. 2011). The Fifth Circuit reached the same conclusion. It stated, "a ruling that a defendant *always* can 'pick off' a named plaintiff's FLSA claims before the plaintiff has a chance to certify the collective action would obviate one purpose of the collective action provision." *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 918-19 (5th Cir. 2008). The Ninth Circuit agreed, stating in *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011), that picking off "would effectively ensure that claims that are too economically insignificant to be brought on their own would never have their day in court."[4] If an offer of judgment moots a collective action, defendants will have a strong incentive to pick off named plaintiffs in this way whenever they believe a collective action may expose systemic abuses and incur a large financial loss or negative press.

The pernicious effects of such strategic mooting by defendants on workers' ability to enforce their rights are heightened in collective actions because the statute of limitations clock for a similarly situated plaintiff does

[4] *But see Smith v. T-Mobile USA, Inc.*, 570 F.3d 1119, 1122 (9th Cir. 2009) (holding to the contrary when named plaintiffs voluntarily settled their claims and district court had already *rejected* certification by similarly situated individuals).

not stop until the plaintiff has opted into the lawsuit, in contrast to class actions, where the claims of all certified class members are considered to have been filed at the time of the initial class complaint. Thus, as the court below recognized, "[p]rotracted disputes over the propriety of dismissal in light of Rule 68 offers may deprive potential opt-ins whose claims are in jeopardy of expiring of the opportunity to toll the limitations period—and preserve their entitlements to recovery—by filing consents within the prescribed window." *Symczyk*, 656 F.3d at 200. Under Genesis' proposed rule, an employer could simply make a new offer of judgment to any newly substituted plaintiff, prior to notice of the action being given to the class of potential plaintiffs, and continue in this manner until the statute of limitations ran on the claims, thus avoiding liability to the class as a whole.

The instant case potently illustrates an additional problem posed by Genesis's proposed rule. Genesis made its Rule 68 offer a mere two weeks after initial discovery opened, and before Ms. Symczyk could move for certification.[5] If the defendant is able to curtail initial discovery through an offer of judgment in this way, then it will often be difficult, if not impossible, to identify and substitute another person as the named plaintiff. Without initial discovery of the identity of the other affected individuals on payroll and the scope of

[5] Ms. Symczyk has a pending motion for certification and *Hoffman* notice made after the case was remanded to the district court but before certiorari had been granted. *See* Pl's Mot. For Condition Certification and Judicial Notice Pursuant to Section 216(b) of the FLSA, *Symczyk v. Genesis Healthcare Corp.*, 2:09-cv-05782-MMB (Apr. 12, 2012).

the violations, as a prelude to notice to those individuals of the claims and the right to opt in, *see Hoffman-LaRoche*, 493 U.S. at 170, the collective action provision will be functionally toothless in many cases.

This Court has recognized the evils of "picking off" in the Rule 23 context. *Roper*, 445 U.S. at 340, and *U.S. Parole Commission v. Geraghty*, 445 U.S. 388 (1980), speak directly to this issue. At the heart of these cases is a concern for ensuring an impartial court system is available to all. *See* 445 U.S. at 340. The reasoning of *Roper* and *Geraghty* applies with equal force in the 216(b) context. As the Fifth Circuit has stated, "[a]lthough the differences between Rule 23 class actions and FLSA § 216(b) collective actions alter the conceptual mootness inquiry, each type of action would be rendered a nullity if defendants could simply moot the claims as soon as the representative plaintiff files suit." *Sandoz*, 553 F.3d at 920. Permitting such strategic mooting of collective actions would leave vulnerable workers like the nursing home workers in this case without meaningful remedies under the FLSA and the EPA. A ruling for Genesis would violate the principles embraced by this Court in *Roper* and *Geraghty* and would undermine the purpose of the statutes the collective action was designed to enforce.

CONCLUSION

For these reasons and the reasons set out in Respondent's brief, the decision below should be affirmed.

Respectfully submitted,

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APPENDIX

The Service Employees International Union ("SEIU") is one of the largest unions in North America, representing 2.1 million men and women. As the largest healthcare union in the United States, SEIU represents more than 1.2 million workers in hospitals, nursing homes, clinics, home care agencies, and other healthcare institutions. Of particular relevance to this case, SEIU represents approximately 160,000 nursing home workers, of which nearly 4,900 are employees of defendant Genesis Healthcare Corporation in seven states. SEIU's interest in this case is in protecting collective actions as means of obtaining relief for Fair Labor Standards Act ("FLSA") violations, particularly in the nursing home industry.

The National Women's Law Center ("NWLC") is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights in all aspects of their lives. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, with a particular focus on the rights of low-wage working women. NWLC's work to achieve fair pay for women includes efforts to strengthen the laws protecting women from compensation discrimination, enforce women's right to equal pay under existing laws, and increase the minimum wage. NWLC has appeared as *amicus* in numerous employment law cases before this Court.

Change to Win is a federation of four labor unions—the International Brotherhood of Teamsters, United Farm Workers of America, United Food and Commercial Workers International Union, and SEIU—which collectively represent more than five million

working men and women. Members of Change to Win's affiliated unions are employed in such varied industries as transportation, warehousing, retail food, food processing, health services, building services, garment manufacturing, laundry and gaming. Many of the members of Change to Win are low-wage workers whose ability to vindicate their rights under the FLSA would be significantly harmed if they are unable to do so through collective action.

The National Consumer Voice for Quality Long Term Care (the "Consumer Voice") was formed in 1975 as the National Citizens' Coalition for Nursing Home Reform. Members and subscribers to the Consumer Voice's information resources, from nearly all 50 states, comprise a diverse and caring coalition of local citizen action groups, state and local long-term care ombudsmen, legal services programs, religious organizations, professional groups, nursing home employees' unions, concerned providers, national organizations and growing numbers of family and resident councils. The Consumer Voice's mission is to represent consumers at the national level for quality long-term care, services and supports. That includes promoting the critical role of direct-care workers and best practices in quality-care delivery. The Consumer Voice has long held that a strong, stable, well-trained workforce is vital for quality of care and quality of life for residents. As such, the Consumer Voice has adopted numerous public policy resolutions, approved by its membership, recognizing the critical role certified nursing assistants hold in providing good care, including understanding of residents' needs and preferences.

The National Consumers League ("NCL"), founded

in 1899, is the nation's oldest consumer organization. The mission of the NCL is to promote fairness and economic justice for consumers and workers in the United States and abroad. The NCL is a non-profit advocacy group which provides government, businesses, and other organizations with the individual's perspective on concerns including, *inter alia*, child labor, workers' rights, and other work place issues. The NCL appears before legislatures, administrative agencies, and the courts across the country, advocating the enactment and vigorous enforcement of laws that effectively protect consumers and employees. For more than 100 years the NCL has worked to promote a fair marketplace for workers and consumers. This was the reason for the NCL's founding in 1899 and still guides it into its second century.

The National Partnership for Women & Families (formerly the Women's Legal Defense Fund) is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Since its founding in 1971, the National Partnership has devoted significant resources to combating invidious workplace discrimination, including compensation discrimination, and has filed numerous *amicus curiae* briefs in the Supreme Court and in Courts of Appeals to advance equal employment opportunities and to ensure strong enforcement of existing rights to fair pay.