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No. 11-1059

IN THE
Supreme Court of the United States

GENESIS HEALTHCARE CORP. 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 *AMICI CURIAE* SCHOLARS STEPHEN B. BURBANK, JOHN C. COFFEE, JR., CYNTHIA ESTLUND, AND DAVID L. SHAPIRO, IN SUPPORT OF RESPONDENT AND URGING AFFIRMANCE

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INTEREST OF *AMICI CURIAE*

Amici Scholars (listed in the Appendix)[1] have an important interest in the question presented: whether an unaccepted and withdrawn Rule 68 settlement offer renders moot a collective action under Section 216(b) of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 216(b). *Amici* Scholars have studied and written extensively in the fields of law implicated by this question, which involves issues at the intersection of employment law and civil procedure.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici Scholars agree with Respondent and the United States that the mere receipt of a Rule 68 settlement offer does not moot an individual's Section 216(b) claim on the merits. But even if the plaintiff's individual claim were deemed to be moot, there would still be a justiciable controversy, in Article III terms, over whether to certify a collective

[1] This brief has been filed with the written consent of the parties, which is on file with the Clerk of Court. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

action, given the FLSA's remedial scheme. A collective action under Section 216(b) has a public dimension that transcends a plaintiff's individual claim.

In the context of a class action under Rule 23, this Court has recognized that the procedural right of a named plaintiff to act on behalf of the collective interests of the class exists independently of the plaintiff's individual claim. In *Sosna v. Iowa*, 419 U.S. 393 (1975), for example, this Court explained that the class "acquire[s] a legal status separate from the interest asserted by" the named plaintiff." *Id.* at 399. "[T]his factor significantly affects the mootness determination." *Id.* Following *Sosna*, this Court applied the same principle in *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 407 (1980), *Deposit Guaranty National Bank of Jackson v. Roper*, 445 U.S. 326 (1980), and *Gerstein v. Pugh*, 420 U.S. 103 (1975).

Although Section 216(b) of the FLSA predates the 1966 class action amendments of Rule 23, the same principle recognized in *Sosna*, *Geraghty*, and *Roper* is salient here. Section 216(b) protects workers with unequal resources or bargaining power by providing a collective action mechanism. An action under Section 216(b) serves a public interest that is broader than an individual employee's claim.

In fact, the argument against mootness is stronger here than it was in the Rule 23 cases of *Sosna*, *Geraghty*, and *Roper*. The instant case involves not merely a procedural rule but a statutory remedy enacted by Congress. If a settlement offer extended under Rule 68 to an individual plaintiff

prior to (what has come to be called) a motion for "certification" could prevent a court from ever reaching the certification issue, the opportunity for the court to consider a Section 216(b) collective action would be at the mercy of a defendant, even in cases where such an action would be clearly appropriate. Thus, to allow a defendant to "pick off" individual named plaintiffs would thwart a collective action and frustrate the congressional purpose of Section 216(b).

To construe Rule 68 as overriding a statutory provision (Section 216(b)) that authorizes collective actions and requires trial judges to manage the notice and opt-in process of aggregating other plaintiffs, would be to raise serious questions under the Rules Enabling Act. Rule 68 should not be used to undercut Congress's carefully crafted system for enforcement of the FLSA.

In determining mootness in the context of a settlement offer, and to avoid undermining the congressional purpose of Section 216(b), a court may properly regard a collective action as one on behalf of the entire opt-in class from the date of filing of the complaint. In such a situation, a district court should permit an FLSA plaintiff to move for "certification" of a collective action under Section 216(b), and absent a judicial finding of undue delay, should relate the motion back to the filing of the initial complaint.

ARGUMENT

Amici Scholars agree with Respondent and the United States that a withdrawn and unaccepted Rule 68 offer does not moot a plaintiff's individual

claim. However, even if a Rule 68 offer could eliminate a plaintiff's personal stake in an action, such an offer would not moot a dispute about "certification" of a collective action pursuant to Section 216(b).

A. Section 216(b) Is An Integral Part of The Statutory Enforcement Scheme.

The Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*. ("FLSA"), was designed "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).

Under the "collective action" mechanism set forth in 29 U.S.C. § 216(b), an employee alleging an FLSA violation may bring an action on "behalf of himself . . . and other employees similarly situated," subject to the requirement that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." As this Court has noted, "Congress has stated its policy that . . . plaintiffs should have the opportunity to proceed collectively. A collective action allows . . . plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity." *Hoffmann-La Roche* v. *Sperling*, 493 U.S. 165, 170 (1989) (explaining that the Age Discrimination in Employment Act (ADEA)

incorporates the remedy of Section 216(b) of the FLSA).

Section 216(b) plays an important role in the statutory scheme by facilitating access to the courts. Otherwise, workplace dynamics and fear of reprisals may deter workers from bringing individual claims on their own or cooperating with government enforcement efforts. *See* Cynthia Estlund, REGOVERNING THE WORKPLACE 17-19, 60-68, 116-28, 142-47, 226-33 (2010). Although Petitioner notes that "at all times since the filing of the complaint, respondent has been the sole plaintiff" and that "no other individual ever has joined the complaint" (Pet. Br. 3), the reticence of Respondent's co-workers may reflect the pressures of the workplace rather than the absence of FLSA violations.

"[W]here the bare economics tempt employers to underpay their workers, public law typically does too little to outweigh that temptation and too little to induce employers to undertake serious self-regulatory efforts." Estlund, REGOVERNING THE WORKPLACE at 108. "Private rights of action enable individual employees, groups of employees, and their advocates to supplement government enforcement efforts and to provide added leverage and the possibility for prospective relief aimed at long-term corrective action." *Id.* at 109. "[A] private bar that represents employees" is on1e way "to address the enforcement deficit" that employees "face in their workplaces." *Id.* at 108.

The record before Congress at the time of the FLSA's enactment demonstrated the need for a collective action mechanism. As one conferee stated,

Congress designed the collective-action device so that "employees [would] not suffer the burden of an expensive lawsuit." 83 Cong. Rec. 9264 (1938) (statement of Rep. Kent Keller). During the joint hearings on the Act, other members of Congress expressed concerns about efficiency. For example, the Chairman of the House Committee on Labor was concerned with the "multifariousness" of potential lawsuits and asked an expert what would happen if a "thousand men" brought suit. *Fair Labor Standards Act of 1937: Joint Hearings Before the S. Comm. on Educ. & Labor and the H. Comm. on Labor on S. 2475 and H.R. 7200*, 75th Cong. 461 (1937) (statement of Rep. William Connery). Another Representative worried that there would be "a thousand and one suits." *Id.* at 461 (statement of Rep. Albert Thomas); *see also id.* at 69 (statement of Rep. Albert Thomas) ("[I]t is going to put an undue burden on the dockets of the Federal court or even the State justice of the peace, all of those cases.").

Proponents, including then-Assistant Attorney General Robert H. Jackson, responded that the collective action device would address risks of multiple lawsuits. *See, e.g.*, *id.* at 70 (statement of Assistant Att'y Gen. Robert H. Jackson) ("[I]f you had a hundred employees in one factory, and you take an assignment of all their claims, the very purpose of this was to avoid a multiplicity of actions and to see that a single action was brought."). As one contemporary court remarked, "It brings something of the strength of collective bargaining to a collective lawsuit." *Pentland v. Dravo Corp.*, 152 F.2d 851, 853 (3d Cir. 1945). *See also Shain v. Armour & Co.*, 40 F. Supp. 488, 490 (W.D. Ky. 1941)

("The evident purpose of the Act is to provide one law suit in which the claims of different employees . . . can be presented and adjudicated.").

Although the FLSA has been amended more than a dozen times,[2] Congress has consistently declined the opportunity to amend the "similarly situated" phrase in the FLSA. Accordingly, every enacted version of the FLSA and even some of the earliest pre-enactment versions[3] have included a collective action device.[4]

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[2] For amendments to Section 216, see Act of May 14, 1947, ch. 52, § 5(a), 61 Stat. 87; Act of Oct. 26, 1949, ch. 736, § 14, 63 Stat. 919; Reorganization Plan No. 6 of 1950, §§ 1-2, 64 Stat. 1263; Act of Aug. 8, 1956, ch. 1035, § 4, 70 Stat. 1118; Aug. 30, 1957, Pub. L. No. 85-231, § 1(2), 71 Stat. 514; Act of May 5, 1961, Pub. L. No. 87-30, § 12(a), 75 Stat. 74; Act of Sept. 23, 1966, Pub. L. No. 89-601, tit. VI, § 601(a), 80 Stat. 844; Act of Apr. 8, 1974, Pub. L. No. 93-259, §§ 6(d)(1), 25(c), 26, 88 Stat. 61, 72, 73; Act of Nov. 1, 1977, Pub. L. No. 95-151, § 10, 91 Stat. 1252; Act of Nov. 17, 1989, Pub. L. No. 101-157, § 9, 103 Stat. 945; Act of Nov. 5, 1990, Pub. L. No. 101-508, tit. III, § 3103, 104 Stat. 1388-29; Act of Aug. 6, 1996, Pub. L. No. 104-174, § 2, 110 Stat. 1554; and Act of May 21, 2008, Pub. L. No. 110-233, tit. III, § 302(a), 122 Stat. 920.

[3] *See, e.g.*, Fair Labor Standards Act of 1937, S. 2475, 75th Cong. § 18(b) (as passed by Senate, Aug. 2, 1937).

[4] The original version of Section 216(b) allowed employees to "designate an agent or representative to maintain [an] action for and in behalf of all employees similarly situated." *Martino v. Mich. Window Cleaning Co.*, 327 U.S. 173, 175 n. 1 (1946) (quoting Fair Labor Standards Act of 1938, Pub.L. No. 75–718, § 16(b), 52 Stat. 1060, 1069 (1938)). In the Portal–to–Portal Act of 1947, Pub.L. No. 80–49, § 5(a), 61 Stat. 84, 87 (1947), Congress amended the FLSA to eliminate "representative actions" by plaintiffs who did not themselves possess claims under the statute. Congress also amended Section 216(b) by

B. An FLSA Collective Action Does Not Become Moot Even If An Individual Action Is Deemed To Be Moot.

In light of the public interest in a Section 216(b) collective action, and the importance of such a remedy to the FLSA statutory scheme, a collective action would still present a justiciable controversy if a Rule 68 offer were deemed to eliminate a plaintiff's individual stake in the case. In determining mootness in the context of a settlement offer, a court should regard a collective action as one on behalf of the entire opt-in class from the date of filing of the complaint. Such relation-back is necessary to avoid

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inserting a requirement that similarly situated employees affirmatively "opt in" to an ongoing FLSA suit by filing express, written consents in order to become party plaintiffs. Neither of the 1947 statutory changes removed the ability of injured employees to bring collective actions on behalf of themselves or similarly situated employees. In fact, the relevant committee reports reaffirmed that "[c]ollective actions brought by an employee or employees (a real party in interest) for and in behalf of himself or themselves and other employees similarly situated may continue to be brought in accordance with the existing provisions of the Act." H.R. Rep. No. 80-326, at 13 (1947) (Conf. Rep.); S. Rep. No. 80-37, at 48 (1947); S. Rep. No. 80-48, at 49 (1947). As Representative Samuel Hobbs, a member of the subcommittee that drafted the Portal-to-Portal Act, explained, "[t]he only thing we are after by that provision is the unauthorized suing for people who do not want it done." 93 Cong. Rec. 1560 (1947). Likewise, Senator Forrest Donnell, the chairman of the subcommittee that conducted the hearings on the legislation, sharply distinguished between collective and representative actions and emphasized that Congress had "no objection" to employees suing for themselves and other employees. *See* 93 Cong. Rec. 2182.

undermining the congressional purpose of Section 216(b).

The collective action remedy under Section 216(b) has a public dimension that transcends a plaintiff's individual claim. As this Court has recognized, the statute contemplates active judicial involvement in the notice and opt-in process of collective actions. "Section 216(b)'s affirmative permission for employees to proceed on behalf of those similarly situated must grant the court the requisite procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands or the provisions of the Federal Rules of Civil Procedure." *Hoffmann-La Roche* v. *Sperling*, 493 U.S. at 170. The benefits of the statute "depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Id.* at 170. Accordingly, once a plaintiff files a Section 216(b) action, "the court has a managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way." *Id.* at 170-71. "The court is not limited to waiting passively for objections about the manner in which the consents were obtained. By monitoring preparation and distribution of the notice, a court can ensure that it is timely, accurate, and informative." *Id.* at 172.

In the context of a class action under Rule 23, this Court has recognized the procedural right of a named plaintiff to act on behalf of the collective interests of the class – a right that exists

independently of the plaintiff's substantive claims. In *Sosna v. Iowa*, 419 U.S. 393 (1975), for example, this Court explained that the mooting of a class representative's individual claims does not invariably result in the mooting of the entire action because "the class of unnamed persons described in the certification acquire[s] a legal status separate from the interest asserted by [the named plaintiff]." *Id.* at 399. "[T]his factor significantly affects the mootness determination." *Id.* "The controversy may exist . . . 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." *Id.* at 402. In order to give effect to the purposes of Rule 23, this Court conceived of the named plaintiff as a part of an indivisible class and not merely as a solitary adverse party. In such circumstances, the "relation back" doctrine allows a court to retain jurisdiction over a matter that would appear susceptible to dismissal on mootness grounds by virtue of the expiration or satisfaction of the named plaintiff's individual claims.

Following *Sosna*, this Court has applied the same principle in a series of cases, including:

U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 407 (1980), which held that an action brought on behalf of a class did not become moot upon expiration of the named plaintiff's substantive claim and that Geraghty was therefore a proper representative for the purpose of appealing the ruling denying certification of the class that he initially defined. The Court disavowed a "rigidly formalistic approach to Art. III" as "rest[ing] on a fundamental misconception about the mootness of an

uncertified class action after settlement of the named plaintiffs' claims." *Id.* at 404 n.11;

Deposit Guaranty National Bank of Jackson v. Roper, 445 U.S. 326 (1980), which held that neither a defendant's tender to each plaintiff of the maximum amount that each could have recovered nor the district court's entry of judgment in favor of plaintiffs over their objections mooted the plaintiffs' interest in the resolution of the class certification question, and that the plaintiffs could therefore appeal from district court's ruling denying class certification; and

Gerstein v. Pugh, 420 U.S. 103 (1975), which held that a class action challenging pretrial detention conditions was not moot, even though the named plaintiffs were no longer in custody, and there was no indication that the particular named plaintiffs might again be subject to pretrial detention. This Court opined that "in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case." *Id*. at 110 n.11.

C. Petitioner's Attempts To Distinguish Rule 23 Precedent Is Unavailing.

Petitioner has proposed two differences between the Rule 23 line of precedent and the instant case, but neither difference is meaningful. In fact, the case against mootness is stronger in the FLSA context than it was in the Rule 23 cases of *Sosna*, *Geraghty*, and *Roper*.

1. Petitioner contends that in *Roper* and *Geraghty* the trial court already had ruled on a class certification motion before the vitiation of the personal stake of the named plaintiffs. Pet. Br. 22. Here, the district court did not have the opportunity to rule on a motion for certification before Petitioner made its Rule 68 offer of judgment.

But the timing of the offer of judgment is entirely within the control of the defendant, and to make the sequence of events determinative would ignore the mandate of the FLSA that puts judges in charge of the process and instead give the defendant unilateral control over whether a court is able to entertain a certification motion. As this Court warned in *Roper*, to permit a defendant "to 'buy off' the individual private claims of the named plaintiffs would be contrary to sound judicial administration. Requiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement." 445 U.S. at 339.

Under Petitioner's approach, a fast-acting defendant could achieve the very result the Court sought to avoid in cases like *Roper* and *Geraghty* by making the offer of settlement immediately on receipt of the complaint. Indeed, because collective actions under Section 216(b) may involve comparatively fewer and more readily identifiable members than Rule 23 class actions, concerns about "picking off" plaintiffs are especially acute in the

Section 216(b) context. FLSA cases also present heightened efficiency considerations, because claims for lost wages may be relatively small and the costs of litigation prohibitive for each individual employee.

The time-intensive nature of the notice and opt-in process under Section 216(b) further underscores the importance of affording prospective plaintiffs a sufficient opportunity to join a suit. As this Court has observed, district courts have developed ways of managing the notice and opt-in process under the FLSA. "[T]rial court involvement in the notice process is inevitable in cases with numerous plaintiffs where written consent is required by statute." *Hoffmann-La Roche* v. *Sperling*, 493 U.S. at 171. It takes time for a lead plaintiff to provide other employees with notice of the suit, for prospective plaintiffs to opt-in, and for a district court to manage the process. During this period of delay, collective actions under Section 216(b) could prove vulnerable to pick-off strategies by defendants. In short, Petitioner's approach would fly directly in the face of the congressional purpose in enacting Section 216(b).

Hence, an FLSA plaintiff must be given time and an opportunity to move to certify a collective action before a defendant can attempt to moot the claim through an offer of judgment. In *Geraghty*, this Court indicated that, given the relation back doctrine, the precise timing of a class certification motion is not crucial to the mootness inquiry. *See* 445 U.S. at 398 ("Although one might argue that *Sosna* contains at least an implication that the critical factor for Art. III purposes is the timing of class certification, other cases, applying a 'relation

back' approach, clearly demonstrate that timing is not crucial.").

Similarly, although *Sosna* itself involved a situation where the district court had ruled on the certification motion, this Court indicated that such a ruling was not a prerequisite to application of the relation back principle. *See* 419 U.S. at 402 n.11 ("There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them *before the district court can reasonably be expected to rule on a certification motion*. In such instances, whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.") (emphasis added). Accordingly, absent a judicial finding of undue delay, when an FLSA plaintiff moves for "certification" of a collective action, the appropriate course is for the district court to relate the motion back to the filing of the initial complaint.

Petitioners acknowledge that "a district court's class certification decision is so important that there is an independent interest in obtaining appellate review of it." Pet. Br. 22. But the same reasoning applies to Section 216(b) collective actions as well. Such actions are sufficiently important to the FLSA remedial scheme that there is an independent interest in ensuring that a court has the opportunity to consider certification. The "relation back" principle is necessary to vindicate the congressional purpose embodied in Section 216(b).

The Court recognized a similar interest of absent class members in *Smith v. Bayer*, 131 S.Ct. 2368 (2011), which held that a denial of motion for class certification by one named plaintiff does not preclude future efforts to sue on behalf of a class by other class members. *Id.* at 2379-80. The Court concluded that a class action was not barred by an event occurring prior to a certification motion (the denial of certification in a previous case), because absent class members have an interest in pursuing their own claims. Indeed, a putative member of an uncertified class may wait until after the court rules on the certification motion to file an individual claim or move to intervene in the suit. *Id.* at 2379 n.10. The same interest in preserving the ability of class members to vindicate their claims is present here. The possibility of a collective action must be kept alive until a court has the opportunity to rule on certification, in order to prevent a defendant from sabotaging the class by offering to buy off the individual plaintiff.

The procedural history of the instant case illustrates the fatal flaw in any rule that would allow defendants to moot collective actions via offers of judgment extended before motions for certification are filed. In this case, the district court scheduled discovery to enable Respondent to develop the evidence necessary for a certification motion, but Petitioner had already extended the Rule 68 offer before such discovery could even begin.[5] The Court

[5] *See* Pet. App. 4a-5a ("The District Court—unaware of the offer of judgment—held a Fed.R.Civ.P. 16 scheduling conference on March 8, 2010. Two days later, the court entered a scheduling order providing for 'an initial ninety (90) day

of Appeals explained that discovery would have enabled Respondent to make a more "meaningful motion" for certification. Pet. App. 10a n.5.[6] The Court of Appeals observed that "had the [district] court in fact facilitated notice to potential opt-ins based solely on the allegations in [Respondent's] complaint, defendants' Rule 68 offer may not have antedated the arrival of a consent form from a party plaintiff, an occurrence that would have fundamentally transformed the court's mootness analysis." *Id.* Clearly, however, the judicial system would be better served by a rule that enables plaintiffs to develop basic discovery before moving for certification, rather than forcing them to avoid

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discovery period, at the close of which [Symczyk] will move for conditional certification under § 216(b) of the FLSA.' Following the court's ruling on certification, the parties were to have 'an additional six (6) month discovery period, to commence at the close of any Court-ordered opt-in window.'").

[6] *See* Pet. App. 10a n.5 ("Here, the [district] court—unaware of defendants' Rule 68 offer—issued a case management order allotting Symczyk 'an initial ninety (90) day discovery period' to compile evidence before she would be expected to move for 'conditional certification.' Symczyk represents she considered the standard for 'conditional certification' a 'moving target in our circuit' and requested discovery in order to buttress the allegations in her pleadings with sufficient evidence to make a 'meaningful motion' at this initial stage. Because defendants' Rule 68 offer preceded the commencement of this preliminary discovery period, however, Symczyk had no opportunity to gather such evidence before the court granted defendants' motion to dismiss. Had Symczyk been operating under the assumption that the court would employ the 'substantial allegation' standard, she may have been prepared to move for 'conditional certification' without conducting minimal discovery.").

mootness risks by seeking certification and opt-in consent forms prematurely, on the basis of barebones pleadings.

In order to ensure that a district court has the opportunity to consider certification, the relevant date for relation back in this context must be the date when the complaint was filed. Indeed, this Court has recognized the relevance of the date of filing for purposes of determining mootness. In *Sosna*, this Court explained that such certification "can be said to 'relate back' to the filing of the complaint" when the issue might otherwise evade review. 419 U.S. at 402 n.11. Similarly, in *Geraghty*, the Court distinguished the facts in *Gerstein v. Pugh* from a case that was "brought a day after the prisoner was released." 445 U.S. at 404 n.11. In the present case, relation back to the date of filing is plainly required if defendants are to be prevented from frustrating the remedial scheme of the FLSA.[7]

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[7] To be sure, the Court in *Geraghty* itself, at note 11, limited relation back to "the date of the original denial [of certification]." This was sufficient to avoid mootness in that case, but the date of denial is not one with juridical significance with respect to the issues at stake in this case. As noted above, this Court made clear in *Smith v. Bayer*, 131 S.Ct. 2368 (2011), that a denial of certification on motion of one class member does not bar future efforts to sue on behalf of a class by other class members. And as shown by the references in the text, the key to all the Court's decisions in this area is the importance of keeping the class action alive until a definitive ruling – after appeal if necessary – could be rendered on the appropriateness of certification. In the context of an offer of settlement to the individual plaintiff in a Section 216(b) collective action, that goal can be achieved (if the offer would otherwise moot the

2. Petitioner also contends that the instant case differs from the *Sosna* line of precedent because, unlike a class action pursuant to Rule 23, this case involves an opt-in collective action under Section 216(b), one in which no member of the class is ever part of the case, or bound by its result, until and unless that member signs a written consent to become a party.

Whatever the relevance of the opt-in/opt-out distinction in other contexts, it is not decisive on the question of mootness. Here, the purpose of the relation back concept is the same in both types of cases: to allow a plaintiff to serve as the class representative of a similarly situated group whose members might lack the ability to pursue such an action on their own. The status of a case as an "opt-in" or "opt-out" action has no bearing on whether a defendant may unilaterally moot a plaintiff's case through a Rule 68 offer of judgment. Each type of action would be rendered a nullity if defendants could "pick off" representative plaintiffs as soon as they filed suit. In short, the policies behind applying the "relation back" principle for Rule 23 class actions apply with equal force to Section 216(b) collective actions.

If anything, the differences between Rule 23 and Section 216(b) cut in favor of Respondent, not Petitioner. Section 216(b) is not simply a procedural rule like Rule 23, which under the Rules Enabling Act, 28 U.S.C. § 2072(b), may not be construed to alter a scheme of substantive rights. *See Wal-Mart*

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individual's claim) only by allowing relation back of the class certification to the filing of the complaint.

Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2561 (2011) ("[T]he Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right' …") (quoting 28 U.S.C. § 2072(b)); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) ("The Rules Enabling Act underscores the need for caution. As we said in *Amchem*, no reading of the Rule can ignore the Act's mandate that 'rules of procedure "shall not abridge, enlarge or modify any substantive right."'") (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997)); *see also* Fed. R. Civ. P. 82 (providing that procedural rules "do not extend or limit the jurisdiction of the district courts").

By contrast, a collective action under Section 216(b) is a statutory action, integral to a congressional scheme aimed at vindicating the substantive rights created by the FLSA. A collective action brought pursuant to an Act of Congress raises no issues under either the Enabling Act or under Rule 82.

Indeed, it is Petitioner's approach that raises questions under the Rules Enabling Act. Petitioner seeks to transform Rule 68 into a tool for defendants to undercut Congress's carefully crafted system for enforcement of the FLSA, by allowing defendants to use Rule 68 to "pick off" plaintiffs in collective actions.

The Rules Enabling Act forbids an interpretation of Rule 68 that would abridge substantive rights – much less one that would nullify the FLSA remedial scheme. Rule 68 says nothing about mootness. It provides simply that "[a]n unaccepted offer is considered withdrawn," and "[e]vidence of an

unaccepted offer is not admissible except in a proceeding to determine costs." Rule 68(b). The Rule 68 sanction for not accepting an offer is a limited one: an award of costs to the defendant in the event that the plaintiff does not recover more than the amount of the offer. Rule 68(d). If anything, this sanction assumes that an unaccepted offer does *not* moot a plaintiff's claim and that the case would proceed to trial. The 1946 Advisory Committee Notes refer to the effect of the offer "as long as the case continues—whether there be a first, second or third trial." Rule 68, in short, is oblivious to the question of mootness.

The scope of Rule 68 is limited. "The plain purpose of Rule 68 is to encourage settlement and avoid litigation." *Marek v. Chesny*, 473 U.S. 1, 5 (1985). Rule 68 does not operate to divest a trial judge's discretion over costs for purposes of Rule 54(d). *See Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981). Proposals in 1983 and 1984 to "put teeth into" Rule 68 (by, for example, authorizing courts to impose sanctions for unreasonable rejections of settlement offers) proved so controversial that they were withdrawn. *See* Stephen B. Burbank, *Proposals to Amend Rule 68 – Time to Abandon Ship*, 19 U. MICH. J. L. REFORM 425, 426, 428-29 n.20 (1985-1986).

Rule 68 should not be stretched to create a collision with the FLSA. Yet Petitioner seeks to manipulate Rule 68 to deny similarly situated employees a genuine chance to opt into a collective action, even though that is precisely the approach that Congress provided in Section 216(b).

Rule 68 should not be interpreted as frustrating the statutory scheme in such a manner. The proper course is to hold that when a FLSA plaintiff files a timely motion for certification of a collective action, that motion relates back to the date the plaintiff filed the initial complaint.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

Stephen B. Burbank is the David Berger Professor for the Administration of Justice at the University of Pennsylvania Law School. He is the author of definitive works on federal court rulemaking, interjurisdictional preclusion, litigation sanctions, international civil litigation, and judicial independence and accountability. He is co-editor of JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Sage, 2002). His 1982 article, *The Rules Enabling Act of 1934*, reoriented the theory and practice of court rulemaking. Burbank's recent scholarship includes a detailed study of the Class Action Fairness Act of 2005 in historical perspective, an analysis of different approaches to the study of judicial behavior in law and political science, a paper on private enforcement of statutory and administrative law in the United States and other common law countries, and an empirical study of the reasons federal judges leave (or do not leave) the bench. He was appointed by the Speaker of the U.S. House of Representatives to the National Commission on Judicial Discipline and Removal and was a principal author of the Commission's 1993 report.

John C. Coffee, Jr. is Adolf A. Berle Professor of Law at Columbia Law School. He has served as Reporter for the American Bar Association for its Model Standards on Sentencing Alternatives and Procedures and for the American Law Institute's Principles of Corporate Governance, and as a member of numerous organizations, including the

Economic Advisory Board to NASDAQ, National Academy of Sciences panel studying empirical research on sentencing, National Research Council's Standing Committee on Law and Justice, Advisory Panel on Environmental Sentencing Guidelines to the United States Sentencing Commission, SEC Advisory Committee on the Capital Formation and Regulatory Processes, Subcouncil on Capital Markets of the United States Competitiveness Policy Council, Legal Advisory Board to the National Association of Securities Dealers (NASD), and Legal Advisory Committee to the board of directors of the New York Stock Exchange. He is a Fellow of the American Academy of Arts and Sciences and has been listed by the National Law Journal as one of "The 100 Most Influential Lawyers in the United States." He has also written on the topic of class actions. *See, e.g.*, "Reforming the Securities Class Action: An Essay on Deterrence and its Implementation," Columbia Law and Economics Working Paper No. 293 (2006).

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David L. Shapiro is William Nelson Cromwell Professor of Law, Emeritus at Harvard Law School, where he has taught courses on civil procedure, the federal system and federal jurisdiction, labor law, the legal profession, and statutory interpretation, among other topics. He has been a visiting professor at Stanford, Oxford, University of Pennsylvania, University of Arizona and New York University. From 1988 to 1991, he took a leave of absence from Harvard Law School to serve as Deputy Solicitor General. His work on federal courts jurisprudence is much celebrated. He has published numerous important articles on the subject, authored the noted book FEDERALISM: A DIALOGUE, and co-edited five of the six editions of the authoritative HART AND WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM. His significant contributions to federal courts jurisprudence led his fellow HART AND WECHSLER editors to dedicate the fifth edition to him.