IN THE

Supreme Court of the United States

NO. 11-1059

GENESIS HEALTHCARE CORPORATION, *ET AL.*,
Petitioners,
v.
LAURA SYMCZYK,
Respondent.

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

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI—The Voice of the Defense Bar is the leading organization of defense attorneys and in-house counsel involved in the defense of civil litigation. DRI provides members with access to resources and

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. All parties consented to the filing of this brief. Copies of the letters granting consent have been filed with the Clerk.

tools to enable attorneys to provide high-quality, balanced, and excellent service to their clients and corporations. DRI is host to more than 25 substantive committees whose focus is to develop ongoing and critical dialogue about areas of practice. For the past 50 years, DRI has sought to enhance the skills, effectiveness, and professionalism of defense lawyers; anticipate and address issues germane to defense lawyers and the civil justice system; promote appreciation of the role of the defense lawyer; improve the civil justice system; and preserve the civil jury.

This case concerns whether a lawsuit can proceed—whether it continues as a "live" case or controversy within the judicial power of Article III—after the lone plaintiff loses any financial or other legally cognizable interest in any judgment that might result. The decision below answered that question in the affirmative, allowing a suit to proceed under the collective-action provision of the Fair Labor Standards Act (FLSA), 29 U.S.C. §216(b), even after the named plaintiff lost any personal stake in the outcome. Indeed, the decision allowed the case to proceed even though there is no longer *any* plaintiff with a personal stake of *any* sort in the outcome.

That ruling is of great concern to DRI, its members, and the clients they represent. DRI's members routinely defend clients in collective litigation across the Nation, whether under the FLSA, Rule 23, or other applicable provisions. DRI, moreover, regularly participates as *amicus* before this Court on issues relating to collective litigation and the need for uniform rules. See, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *McReynolds* (No. 12-113); *Comcast Corp.* v. *Behrend* (No. 11-864); *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011). DRI members and their clients also have an

ongoing interest in ensuring that federal courts confine themselves to their constitutionally appointed role of adjudicating live cases and controversies between actual parties.

In DRI's view, allowing lawsuits to proceed absent a live controversy between identifiable parties is inconsistent with the judiciary's role and is incompatible with fundamental fairness. It cannot be reconciled with the principle that actual plaintiffs, not clientless attorneys, should drive litigation. Accordingly, the judgment below should be reversed.

SUMMARY OF ARGUMENT

I. A. The decision below implicates Article III's most fundamental limit on federal judicial power—the requirement of a live case or controversy between parties with opposing personal stakes in the litigation. In case after case, this Court has recognized the critical role that limit plays in confining federal courts to acts of a judicial nature and preventing intrusion into the domain of the elected Branches. This Court, moreover, has stressed that the requirement of a live controversy must be satisfied throughout the case—from the day the complaint is filed until the judgment becomes final. If a case is no longer live or the parties cease to have a legally cognizable interest in the outcome, the case is moot; the court lacks jurisdiction; and the suit can no longer proceed.

B. The decision below cannot be reconciled with those principles. The decision below found no dispute that respondent lost any concrete interest in this suit after petitioners made her an offer of judgment in full. Nor is there any other plaintiff in this action for whom the controversy remains live and concrete. To the contrary, the FLSA's collective-action provision makes clear that one cannot become an FLSA plaintiff except by affirmatively

opting in: "*No employee shall be a party plaintiff* to any such action," the FLSA provides, "*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." 29 U.S.C. §216(b) (emphasis added). Here, no one has done so, and respondent lost her personal stake in the outcome of this litigation. As a result, the case is moot: The court could afford respondent no more than she already had been offered voluntarily; nor is there any other plaintiff for whom this suit can offer any meaningful relief.

The Third Circuit erred by allowing this plaintiffless suit to proceed nonetheless. The court rested its analysis on the theory that, despite the sole plaintiff's lack of a personal stake, other, unidentified *non-parties* might *later* decide (at some unknown point) to opt in and thereby breathe life back into the suit. But that theory cannot be reconciled with this Court's long tradition of requiring an actual, present, and ongoing case or controversy. Nor can it be reconciled with §216(b)'s text, which provides the exclusive mechanism for a non-party plaintiff to become a party to the suit.

II. A. The decision below is not supported by this Court's decisions in *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326 (1980), and *U.S. Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980). In those cases, this Court allowed putative class representatives to appeal the denial of class certification after their own claims had become moot. The Court reasoned that, although the named plaintiffs lacked any continued personal stake in the merits of their lawsuits, they retained sufficient interests in the certification motions themselves. That reasoning is questionable in its own right. The interests *Roper* and *Geraghty* identified as sufficient are precisely

the sort of collateral byproducts of litigation that this Court has found insufficient to sustain federal jurisdiction in case after case since. In any event, respondent does not and cannot claim any such interest here. She has no economic interest in shifting litigation costs to other plaintiffs because petitioners offered to pay her costs, including attorney's fees, in full. And the FLSA's requirement that all plaintiffs must individually opt in to a collective action precludes any asserted entitlement to represent a class. Policy considerations about good collective-action practice cannot overcome those jurisdictional defects.

B. The absence of any plaintiff with a live personal stake in the merits of this case cannot be cured by the "relation back" doctrine. That doctrine allows judicial correction of erroneous decisions denying class certification by relating a later order certifying a class back to the date of the earlier denial it replaces. Relation back can prevent an action from becoming moot because class certification ensures that a live controversy remains even after the named plaintiff loses her personal stake in the outcome; the other members of the certified class still have theirs. But relation back cannot be invoked where the sole plaintiff's claim becomes moot *before* any decision on class certification, let alone before a certification motion has even been filed. Once the sole plaintiff loses her interest, there is no one left with the requisite personal stake. Invoking relation back is especially inappropriate in an FLSA case: The FLSA expressly provides that additional plaintiffs are considered to enter a collective action only on the date that they file their consent to opt in. As a result, their entry cannot be "related back" to some earlier time to manufacture a continuing and continuous controversy. The Third Circuit's contrary

conclusion transforms relation back in this context from a modest tool of judicial self-correction into a sweeping mechanism for asserting jurisdiction over moot actions that have lost the essential character of an Article III case or controversy.

ARGUMENT

I. THE DECISION BELOW EXPANDS THE FEDERAL JUDICIAL POWER BEYOND ACTUAL CASES AND CONTROVERSIES

The defining feature of the judicial power is that it is limited to live cases and controversies between parties with opposing personal stakes in the outcome—stakes that must exist throughout the duration of the suit. By allowing this plaintiffless lawsuit to proceed despite that feature, the Third Circuit circumvented a critical boundary on the judicial power.

A. Article III Requires A Live Controversy Between Parties With Personal Stakes In The Outcome

Article III of the U.S. Constitution limits the jurisdiction of federal courts to the resolution of "Cases" and "Controversies"—the sorts of disputes traditionally adjudicated by Anglo-American courts. See U.S. Const. art. III, § 2; *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 492-493 (2009). Because of that limitation on federal judicial authority, "Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them,' and confines them to resolving 'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Lewis* v. *Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) (quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971)). Limit-

ing the reach of the federal judiciary to actual cases or controversies prevents a federal court from issuing "a declaration of an abstract character" that benefits none of the parties before it. *Marye* v. *Parsons*, 114 U.S. 325, 329 (1885).

Those principles reflect our tripartite system of government and are critical to public acceptance and understanding of the judicial role. "Continued adherence to the case-or-controversy requirement of Article III maintains the public's confidence in an unelected but restrained Federal Judiciary." *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1442 (2011). "If the judicial power were 'extended to every question under the constitution,' Chief Justice Marshall once explained, federal courts might take possession of 'almost every subject proper for legislative discussion and decision.'" *Ibid.* (quoting 4 *Papers of John Marshall* 95 (C. Cullen ed. 1984)). But deciding "questions of law arising outside of cases and controversies would be inimical to the Constitution's democratic character." *Ibid.* By restricting the judiciary to "the traditional role of Anglo-American courts," the requirement of a live controversy between adverse parties preserves "'the proper—and properly limited—role of the courts in a democratic society.'" *Summers*, 555 U.S. at 492-493.

To satisfy the case-or-controversy requirement, litigants must "demonstrate a 'personal stake' in the suit." *Camreta* v. *Greene*, 131 S. Ct. 2020, 2028 (2011). The party invoking the court's authority must not merely have "suffered an injury in fact" that was caused by "the conduct complained of"; she must also show that the injury "will be redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992) (quotation marks omitted). Those requirements also ensure

that the controversy features "that concrete adverseness which sharpens the presentation of issues." *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983) (quotation marks omitted).

The live controversy must persist throughout the case. *Lewis*, 494 U.S. at 477. "[I]t is not enough that a dispute was very much alive when suit was filed." *Ibid.* Rather, the "case-or-controversy requirement subsists through *all stages* of federal judicial proceedings, trial and appellate." *Ibid.* (emphasis added); see also *United States* v. *Juvenile Male*, 131 S. Ct. 2860, 2864 (2011); *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997); *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975).

If a case ceases to be "alive" at any point during litigation, it can no longer proceed. *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998); see also *S. Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.*, 145 U.S. 300, 301 (1892) (when "litigation has ceased to be between adverse parties, * * * the case * * * is not a real one"). The same is true where intervening circumstances deprive the plaintiff of a "'personal stake in the outcome' of the lawsuit." *Lewis*, 494 U.S. at 478 (quoting *Lyons*, 461 U.S. at 101); see, *e.g.*, *Spencer*, 523 U.S. at 7; *Preiser*, 422 U.S. at 401; *Mills* v. *Green*, 159 U.S. 651, 653 (1895). "Simply stated, a case is *moot* when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969) (emphasis added).

The requirement of a live controversy between parties with personal stakes in the outcome, like other justiciability doctrines, "state[s] fundamental limits on federal judicial power in our system of government." *Allen* v. *Wright*, 468 U.S. 737, 750 (1984). This Court has thus long held that a federal court "is not empowered to de-

cide moot questions or abstract propositions, or to declare * * * principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *California* v. *San Pablo & Tulare R.R. Co.*, 149 U.S. 308, 314 (1893). It is not merely that federal courts "lack jurisdiction to decide moot cases" in some technical sense. *Iron Arrow Honor Soc'y* v. *Heckler*, 464 U.S. 67, 70 (1983).[2] Rather, any effort to adjudicate such a matter would place them beyond their constitutionally assigned role. See, *e.g.*, *Spencer*, 523 U.S. at 7. Refusing to decide moot cases is thus "essential if federal courts are to function within their constitutional sphere of authority." *Rice*, 404 U.S. at 246.

B. Plaintiffless Lawsuits Like Respondent's Defy Article III

1. The decision below defies those settled principles. This lawsuit began as a one-plaintiff case, and should have ended when it became a no-plaintiff case. Respondent filed suit under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§207 and 216(b), alleging that her employer forced its employees to take automatic meal-break salary deductions. Pet. App. 2a-3a. Although the complaint was purportedly filed on her behalf and on behalf of all others similarly situated, the FLSA's collective-action provision expressly and categorically prohibits courts from ascribing party status to unnamed plaintiffs. The FLSA declares: "*No employee shall be a party plaintiff* to any such action *unless he gives his consent in*

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[2] See also, *e.g.*, *Honig* v. *Doe*, 484 U.S. 305, 317 (1988); *id.* at 332-333 (Scalia, J., dissenting); *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974); *Preiser*, 422 U.S. at 401; *SEC* v. *Med. Comm. for Human Rights*, 404 U.S. 403, 407 (1972); *Powell*, 395 U.S. at 496 n.7; *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964); *Eisler* v. *United States*, 338 U.S. 189, 194 (1949) (Murphy, J., dissenting).

writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. §216(b) (emphasis added). Here, it is uncontested that no other employee gave the necessary consent to become a party to respondent's lawsuit. Pet. App. 3a. As a result, respondent was and remained the sole and exclusive plaintiff in the suit.

Two months into the suit, petitioners offered respondent a judgment under Federal Rule of Civil Procedure 68(a) that would have provided her with all of the relief she sought, including attorney's fees, costs, and expenses. Pet. App. 3a-4a. Although she declined to respond, she "did not dispute the adequacy of the offer as it pertained to the value of her individual claim." *Id.* at 20a n.9. Nor does respondent seek injunctive or declaratory relief that could affect her future working conditions; she does not work for petitioners. See *id.* at 3a. It is, as a result, undisputed that she has lost any personal stake in the outcome of this litigation.

The court below acknowledged that, "whether or not the plaintiff accepts the [Rule 68] offer, no justiciable controversy remains when a defendant tenders an offer of judgment under Rule 68 encompassing all the relief a plaintiff could potentially recover at trial." Pet. App. 14a. "Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate, and a plaintiff who refuses to acknowledge this loses outright * * * because he has no remaining stake." *Rand* v. *Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991) (citation omitted). Respondent likewise conceded that "[a]n offer of complete relief will generally moot the plaintiff[']s claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation." J.A. 193. It is thus undisputed and indisputable in this case that, because the

sole plaintiff here no longer has a "'personal stake in the outcome' of the lawsuit," *Lewis*, 494 U.S. at 478, it no longer presents a case or controversy under Article III. "The controversy between the parties * * * clearly ceased to be 'definite and concrete' and no longer 'touch(es) the legal relations of parties having adverse legal interests.'" *DeFunis* v. *Odegaard*, 416 U.S. 312, 317 (1974) (quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937)). It therefore should have been dismissed as moot. *Ibid.*

In similar circumstances, this Court has recognized that, "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." *Church of Scientology of Cal.* v. *United States*, 506 U.S. 9, 12 (1992) (quoting *Mills*, 159 U.S. at 653). The same is true when that event occurs before final judgment is even entered in district court. In both scenarios, the mootness doctrine prevents a court from issuing a decision that is without effect on the parties before it. Once respondent received a concededly complete offer of judgment, she ceased having "a still vital claim" for monetary relief. *Arizonans for Official English*, 520 U.S. at 67.

2. The Third Circuit, however, allowed the case to proceed on the theory that *other* persons might *later* decide to become parties, reviving the now-expired controversy. But the supposition that another plaintiff might *later* inject herself into the case cannot circumvent the requirements of Article III. "Federal courts must hesitate before resolving a controversy * * * on the basis of the rights of third persons not parties to the litigation." *Singleton* v. *Wulff*, 428 U.S. 106, 113 (1976). And when those non-parties possess the *only* rights to be adjudi-

cated, that hesitancy becomes a categorical bar: "[F]ederal courts are *without power* to decide questions that cannot affect the rights of litigants in the case before them." *Rice*, 404 U.S. at 246 (emphasis added); see also *DeFunis*, 416 U.S. at 316.

The *potential* for other persons to *later* decide to become parties does not change the result. "This Court does not sit here to try moot cases to solve a question which may never be raised by any party entitled to raise it." *Waite* v. *Dowley*, 94 U.S. 527, 534 (1877). In *Lewis*, for example, this Court dismissed plaintiff Continental Bank's challenge to a state law after statutory amendments rendered its challenge moot. The Court rejected Continental's argument that invalidating the law would provide relief to other banks, explaining that "the Article III question is not whether the requested relief would be nugatory as to the world at large, but whether *Continental* has a stake in that relief." *Lewis*, 494 U.S. at 479. The mere ability of others to opt in, moreover, "is not an indication of the intent to do so, and thus does not establish a particularized, concrete stake that would be affected by [a court's] judgment." *Ibid.*

The absence of any other party with a concrete, personal interest in this case could not be clearer. The FLSA's collective-action provision expressly provides the triggering event for when an additional person becomes a party to the suit: An employee can "become" a plaintiff in an FLSA case only by "giv[ing] his consent in writing." 29 U.S.C. §216(b). Before that event, the employee is a non-party to the suit. And as a non-party, he plainly has no interest in the outcome of the case. See *Cameron-Grant* v. *Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003), cert. denied *sub nom. Basil* v. *Maxim Healthcare Servs., Inc.*, 541 U.S. 1030 (2004).

The court of appeals did not suggest otherwise, but speculated that some other employee might give written consent and become a party later. Pet. App. 29a. In our adversarial system of justice, however, cases and controversies are between actual plaintiffs and actual defendants. The court of appeals, by contrast, dispensed with having an actual, identifiable plaintiff. Instead, it converted the complainant's side of the "v." into a mere placeholder that could be filled at some later date by an as-yet-unidentified individual of the plaintiff-side lawyers' choosing. But a lawsuit is not a blank dance card into which one can substitute a rotating roster of parties. It is supposed to be an actual dispute between existing parties. If there is no plaintiff, there is no lawsuit; if a new plaintiff comes forth, she should file a new lawsuit.

The decision in this case reflects an increasing tendency to treat lawsuits as having a life separate from the parties that bring them. The desire to do so in longstanding controversies may be understandable. This Court has recognized the "sunk costs" imposed on the judiciary once a "case has been brought and litigated." *Friends of Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191-192 & n.5 (2000). But there are no sunk costs here. The offer of judgment (including attorney's fees) was made years ago, just two months after respondent filed her complaint. Pet. App. 3a-4a; contrast *Laidlaw*, 528 U.S. at 191 ("[B]y the time mootness is an issue, the case has been brought and litigated, often (as here) for years."). And in any event, concern about "sunk costs does not license courts to retain jurisdiction over cases in which one or both of the parties plainly lack a continuing interest." *Laidlaw*, 528 U.S. at 192 (footnote omitted). The decision below cannot be reconciled with that principle. It should be reversed.

II. *ROPER* AND *GERAGHTY* DO NOT SUPPORT THE DECISION BELOW

In allowing respondent's suit to proceed, the court of appeals invoked two decisions in which this Court permitted putative class representatives to appeal the denial of class certification even after losing any personal stake in the merits of the litigation. See Pet. App. 15a, 17a-18a (quoting *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326 (1980); *U.S. Parole Comm'n* v. *Geraghty*, 445 U.S. 388 (1980)). Even in the class-action context, however, those decisions do not sweep as broadly as the court of appeals believed. Far less do they support federal jurisdiction in the present context of a putative FLSA collective action.

A. Neither *Roper* Nor *Geraghty* Affords Respondent Any Personal Stake In This Litigation

Over three decades ago, in two cases decided on the same day, this Court ruled that a putative class representative may appeal the denial of class certification even after his own individual claim becomes moot. *Roper*, 445 U.S. at 336; *Geraghty*, 445 U.S. at 404. In doing so, however, the Court did not abandon Article III's mandate that a litigant must have a personal stake in the litigation. Instead, the Court in each case identified economic and representative interests that the plaintiffs retained in the question of class certification itself, even though their interest in the underlying merits had evaporated. More recent decisions call into question whether the interests the Court identified in *Roper* and *Geraghty* should be sufficient to sustain federal jurisdiction. But even if they are, they cannot salvage respondent's case. She lacks even the collateral pecuniary and representative interests implicated in *Roper* and *Geraghty*.

1. *Respondent Lacks The Pecuniary And Representative Interests Recognized In* Roper *And* Geraghty

In *Roper*, the named plaintiffs sought to certify a class action seeking damages for alleged violations of the National Bank Act. 445 U.S. at 327-328. After the district court denied certification, the defendants tendered them full recovery; the district court subsequently entered judgment in their favor and dismissed the action. *Id.* at 329-330. This Court concluded that the plaintiffs could appeal the denial of their certification motion, even though their individual claims had been rendered moot. *Id.* at 333, 340. Similarly, in *Geraghty*, the Court concluded that a prisoner who brought a putative class action challenging parole release guidelines could appeal the denial of class certification even though he had been released from prison while the appeal was pending. 445 U.S. at 393-394, 404.

Essential to the Court's decision in both cases was its view that a "plaintiff who brings a class action presents two separate issues for judicial resolution"—the claim on the merits and a distinct "claim that he is entitled to represent a class." *Geraghty*, 445 U.S. at 402. Bifurcating the suits in that way, the Court concluded that a plaintiff who had "los[t] * * * a 'personal stake' in the *merits* of the litigation," could nevertheless "continue to press the *class certification claim*"—and only that claim—so long as he retained a sufficient personal stake in its resolution. *Id.* at 400, 402 (emphasis added); see *Roper*, 445 U.S. at 336.

The Court found that the plaintiffs in both cases retained a sufficiently concrete interest. In *Roper*, the Court held that the named plaintiffs "retained an economic interest in class certification." 445 U.S. at 333. In

particular, although the defendants had offered to pay the maximum amount of damages they could recover, *id.* at 329, the plaintiffs asserted a further "desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails," *id.* at 336. As to that interest, a successful appeal on class certification could provide relief. In *Geraghty,* the putative class representative did not seek damages and so could not claim an interest in paying for the litigation out of a class recovery. This Court concluded, however, that his asserted procedural "right to have a class certified" gave him an adequate personal stake to appeal the denial of class certification. 445 U.S. at 404.

Neither of those interests is present here. Unlike the plaintiffs in *Roper*, respondent has asserted no interest in sharing costs with other employees who might join her collective action. Nor could she: Petitioners offered to pay her costs, including attorney's fees, in full. Pet. App. 3a-4a. Respondent therefore has no personal stake in "allocating such costs among all [plaintiffs] who benefit from any recovery." *Roper*, 445 U.S. at 338 n.9.

Unlike the plaintiff in *Geraghty*, moreover, respondent can claim no entitlement to represent others in this suit. Congress deliberately designed the FLSA's collective-action mechanism to *distinguish* collective actions under the FLSA from class actions and to prevent a flood of representative litigation. The procedure for bringing additional plaintiffs into the case lies at the core of that distinction. When a class is certified under Rule 23, unnamed class members automatically become part of the case; they are bound by any resulting judgment unless they affirmatively opt out. See Fed. R. Civ. P. 23(c)(3)(B). Because certification turns on whether the named plaintiff has satisfied Rule 23's requirements, pu-

tative class representatives can colorably claim an "entitle[ment] to represent a class." *Geraghty*, 445 U.S. at 402.

A collective action under the FLSA is "a fundamentally different creature than the Rule 23 class action." *Cameron-Grant*, 347 F.3d at 1249. "No employee," the statute provides, "shall be a party plaintiff to any such action unless he" affirmatively *opts in* by "giv[ing] his consent in writing." 29 U.S.C. §216(b). Respondent's ability to conduct this litigation on behalf of others thus turned entirely on other persons' individual decisions whether to opt in, not on a court's determination whether to issue a certification order deeming those other persons parties to the action. Cf. *Allen*, 468 U.S. at 759 (plaintiff lacks standing to challenge injury attributable to "independent decisions" of third parties). "[I]n the absence of any opt-in plaintiffs," respondent did "not have a procedural right to represent a class." *Smith* v. *T-Mobile USA Inc.*, 570 F.3d 1119, 1122 (9th Cir. 2009).

The Third Circuit disputed none of that. The court acknowledged that the FLSA's "opt-in mechanism transforms the manner in which a named plaintiff acquires a personal stake in representing the interests of others." Pet. App. 25a. But the court dismissed that distinction as not providing "a compelling justification" for reining in this plaintiffless lawsuit. *Ibid.* The court did not find that respondent has some *other* personal stake in this litigation—or that she somehow acquired a personal stake in representing others in some different way. Instead, it concluded as a policy matter that defendants should not be allowed "to impede the advancement of a [putative] representative action." *Ibid.* The court claimed support from statements in *Roper* that allowing named plaintiffs to be "picked off" would "'frustrate the

objectives of class actions.'" *Id.* at 15a (quoting 445 U.S. at 339). But *Roper* did not allow such concerns to trump Article III. This Court *still* insisted that the plaintiff demonstrate a continuing personal stake in some aspect of the litigation. See *Roper*, 445 U.S. at 336. And it emphasized that federal courts' "jurisdiction is limited by [that] personal stake." *Ibid.* The Third Circuit's conclusion that it and the district court could continue to exercise jurisdiction over this case—without ever delineating what personal stake respondent retained in the litigation—cannot be reconciled with *Roper*, *Geraghty*, or the commands of Article III.

2. Roper *And* Geraghty*'s Permissive Approach To Article III Merits Reconsideration, Not Extension*

Because *Roper* and *Geraghty* by their terms do not support the judgment below, respondent in effect seeks not an application of those precedents but their expansion. But *Roper* and *Geraghty* ought not be expanded. To the contrary, they have been so undermined by intervening cases as to warrant their reconsideration.

a. *Roper* held that named plaintiffs who were offered "the maximum amount that each could have recovered" from the defendant nevertheless "retained an economic interest in class certification" sufficient to allow them to appeal a denial of class certification. 445 U.S. at 329, 333. That interest was the plaintiffs' "desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails." *Id.* at 336. The Court described "the prospect of reducing their costs of litigation, particularly attorney's fees, by allocating such costs among all members of the class" as a "significant benefit" to plaintiffs who bring class rather than individual actions. *Id.* at 338 n.9.

Attorney's fees undoubtedly can affect plaintiffs' pocketbooks after the underlying legal dispute has been resolved. But in case after case since *Roper*, this Court has concluded that "an interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." *Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 773 (2000); see also *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit"); *Diamond* v. *Charles*, 476 U.S. 54, 69-71 (1986) (assessment of attorney's fees against a party does not give him standing to pursue the action on appeal). Those decisions gravely undermine *Roper*'s continued vitality.

In *Lewis* v. *Continental Bank Corp.*, for example, Continental opposed an order vacating the judgment below on mootness grounds because doing so "would deprive Continental of its claim for attorney's fees," which were "available only to a party that 'prevails' by winning the relief it seeks." 494 U.S. at 480. This Court rejected that argument, holding that "[t]his interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Ibid.* The Court explained that when "the only concrete interest in the controversy has terminated," courts must "be sure that mooted litigation is not pressed forward * * * solely in order to obtain reimbursement of sunk costs." *Ibid.* That admonition applies with even greater force in a case like *Roper*, where the "reimbursement of sunk costs" is sought *not* from the (formerly) opposing party but from non-parties whose interests are allegedly aligned with the plaintiff's. Such intramural financial squabbles cannot justify subjecting

defendants to the burdens of class litigation and exposing them to potentially massive liability at the sole behest of named plaintiffs they have already made whole.[3]

Roper's contrary holding rested in part on this Court's concern that, absent the class action's "fee-spreading incentive," attorney's fees "could exceed the value of the individual judgment" and "plaintiffs would be unlikely to obtain legal redress at an acceptable cost." 445 U.S. at 338 n.9. Such "policy considerations," *id.* at 340, however, justify rewriting Article III's requirements in the class-action context no more than anywhere else. To the extent that attorney's fees might unduly deter injured persons from seeking relief individually, Congress is fully capable of allowing successful plaintiffs to receive fee awards in addition to their recovery on the merits. It has already done so in the FLSA, among other contexts. See 29 U.S.C. § 216(b).

b. In *Geraghty*, the named plaintiff did not seek damages; consequently, he could not claim even a pecuniary interest in paying for litigation costs from a class recovery. This Court nevertheless held that his asserted "right to have a class certified" provided a sufficient personal stake to allow him to appeal the denial of class certification. 445 U.S. at 404. But a claimed entitlement to serve as a class representative is also "merely a 'byprod-

[3] Whether named plaintiffs will actually succeed in reducing their litigation costs is also wholly speculative. Even assuming a class action will be certified and prevail on the merits (both questionable propositions), litigating a lawsuit on a class basis is almost certain to increase costs exponentially, as class notice, expert reports, claims processes, and other class-action accoutrements become necessary. When all is said and done, there is no reason to assume that the named plaintiffs' share of those massive costs will amount to less than the unshared costs incurred when a Rule 68 offer is made early in the case.

uct' of the suit itself." *Vt. Agency*, 529 U.S. at 773. It is a purely "procedural claim," *Geraghty*, 445 U.S. at 402, that has no existence or meaning independent of the suit. Since *Geraghty*, this Court has made clear that the enforcement of asserted "procedural rights" provides a basis for federal jurisdiction only where "the procedures in question are designed to protect some threatened concrete interest * * * that is the ultimate basis of [the plaintiff's] standing." *Lujan*, 504 U.S. at 573 n.8; see *id.* at 572. While a procedural interest in representing a class may normally be designed to protect an underlying concrete interest—*i.e.*, the substantive relief sought in the class action—it cannot serve that function where the plaintiff concededly no longer has any personal stake in the merits of the litigation. It is a procedural right asserted solely for its own sake—a claimed entitlement to be appointed captain of a ship that the named plaintiff cannot board.

That claimed entitlement, moreover, is exceedingly ethereal. A named plaintiff's bid to represent a class after losing any stake in the outcome is doomed to failure. Although this Court has held that a designated class representative who loses her personal stake may *continue* to represent a class, it has also cautioned that "[a] litigant *must be a member of the class* which he or she seeks to represent *at the time the class action is certified*." *Sosna* v. *Iowa*, 419 U.S. 393, 403 (1975) (emphasis added). A named plaintiff with no remaining claim cannot be a "member" of a class asserting live claims. At the very least, that plaintiff's claims will not be "typical of the claims * * * of the class," precluding her appointment as

class representative for that reason as well. Fed. R. Civ. P. 23(a)(3).[4]

B. Respondent's Suit Cannot Be Salvaged By The "Relation Back" Doctrine

Once respondent's claim became moot—with no other plaintiff in her suit—no live controversy remained; the "litigation * * * ceased to be between adverse parties." *S. Spring Hill*, 145 U.S. at 301. That lapse of an Article III case or controversy obligated the district court to dismiss the action as moot.

The Third Circuit ruled that it could avoid that result by applying "the relation back doctrine." Pet. App. 28a. It held that respondent should be allowed to file a motion for "conditional certification" of her putative collective action. *Id.* at 28a-29a. If the motion were "made without undue delay," the court continued, the district court

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[4] The FLSA, moreover, was deliberately designed to bar collective actions headed by persons with no live claims of their own. As originally enacted, the statute gave both "employees *and their 'representatives'* the right to bring actions to recover amounts due under the FLSA." *Hoffmann-LaRoche, Inc.* v. *Sperling*, 493 U.S. 165, 173 (1989) (emphasis added). Representatives who brought suit did not need to possess claims themselves. *Ibid.* The result was "a flood of suits under the FLSA," most "involv[ing] very large allegations of liability." *Arrington* v. *Nat'l Broad. Co.*, 531 F. Supp. 498, 500 & n.5 (D.D.C. 1982) (citing 93 Cong. Rec. 2087-2088 (1947) (Sen. Donnell)). Congress fixed the problem in 1947. Because of "excessive litigation spawned by plaintiffs lacking a personal interest in the outcome, the representative action by plaintiffs not themselves possessing claims was abolished." *Hoffmann-LaRoche*, 493 U.S. at 173. The result was to "limit[ ] private FLSA plaintiffs to employees who asserted claims in their own right and free[ ] employers of the burden of representative actions." *Ibid.* Allowing respondent to pursue this action on behalf of other employees, despite having no live claim herself, would condone precisely the sort of "representative" FLSA suit Congress sought to abolish.

would "relate the motion back to the filing of the initial complaint." *Id.* at 28a. And if the motion were later granted and "at least one other similarly situated employee opts in, then defendants' Rule 68 offer of judgment would no longer fully satisfy the claims of everyone in the collective action." *Id.* at 29a. At that point, the court concluded, "the proffered rationale behind dismissing the complaint on jurisdictional grounds would no longer be applicable." *Ibid.* By creating the fiction that respondent filed a motion to certify *before* she lost her personal stake in the case, the court of appeals attempted to fulfill Article III's case-or-controversy requirement.

The court derived that holding from *Weiss* v. *Regal Collections*, 385 F.3d 337, 348 (3d Cir. 2004), a class-action case holding that a Rule 68 offer made *before a class certification motion is filed* does not moot the case. There, the court held that a post-offer motion will be treated "as though it had been filed contemporaneously with the filing of the class complaint," bypassing the plaintiff's loss of his personal stake in order to let the class action "'play out.'" Pet. App. 19a (quoting *Weiss*, 385 F.3d at 348). *Weiss* itself was an extension of decisions holding that, when a tender of full recovery is made *while a class certification motion is pending*, a subsequent order certifying the class will relate back to the date the motion was filed, again to negate the impact of an intervening event that would otherwise moot the case. See *id.* at 18a-20a, 23a n.12; *Weiss*, 385 F.3d at 346 (citing cases). Those decisions, in turn, were "exten[sions] [of] *Geraghty*," *Weiss*, 385 F.3d at 346, where this Court addressed relation back when a plaintiff loses his personal stake *after a decision on class certification*, 445 U.S. at 407 n.11.

But those efforts to extend the relation-back doctrine under *Geraghty* fundamentally misconceive that doctrine. The relation-back principle allows courts to relate a corrected decision *granting* class certification back to the date of an earlier, erroneous decision *denying* certification. It cannot be invoked where the sole plaintiff's claim becomes moot *before* a class certification decision has been made. It is even less appropriate in collective actions under the FLSA: The FLSA's collective action provision unambiguously provides that additional plaintiffs are deemed to enter the case only on the date they file their consent to opt in. Relation back cannot be used to circumvent that clear statutory command.

1. *Relation Back Cannot Prevent Mootness When The Named Plaintiff Loses A Personal Stake Before A Decision On Class Certification*

As petitioners note (Pet. 19-22), the courts of appeals have divided over when relation back can prevent an uncertified class action from becoming moot. Some, including the Third Circuit, hold that the doctrine applies even where no certification motion has been filed at the time the named plaintiff loses his personal stake in the litigation; if the plaintiff later files a motion "without undue delay," that motion will relate back to the date of the initial complaint (when the plaintiff's claim was still live). See *Weiss*, 385 F.3d at 348. Other circuits hold that the plaintiff must at least have filed a certification motion before the event that would otherwise render the case moot. See *Damasco* v. *Clearwire Corp.*, 662 F.3d 891, 895 (7th Cir. 2011). Both of those approaches are wrong. Article III and relation-back principles both indicate that mootness is avoided only if there has been a *decision* on

class certification before the named plaintiff's personal stake in the merits disappeared.

a. That was the situation in *Geraghty*. There, the named plaintiff's claim became moot after the district court denied his motion for class certification, while his appeal from the denial was pending. 445 U.S. at 390. This Court held that his personal stake in having the class certified allowed him to pursue the appeal, even though his interest in the litigation's merits had lapsed. *Id.* at 400, 402-404; see pp. 14-16, *supra*. That holding, however, addressed only half of the jurisdictional question. The Court also had to assure itself that a live controversy remained with respect to the merits, notwithstanding the named plaintiff's departure from that battlefield.

On that issue, the Court invoked its earlier decision in *Sosna*. *Sosna*, it observed, held that "mootness of the named plaintiff's individual claim *after* a class has been duly certified does not render the action moot." *Geraghty*, 445 U.S. at 397. Upon class certification, *Sosna* ruled, "the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by" the plaintiff. *Sosna*, 419 U.S. at 399. Even if the named plaintiff's own claim later disappears, the other class members retain their personal stakes in the merits. A continuing "controversy [thus] 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. Because the other class members were brought into *Sosna* before the named plaintiff's claim became moot, there was never a point in that case when no party had a live claim.

Geraghty used the relation-back doctrine to extend *Sosna* to cases where the named plaintiff's claim becomes moot after an erroneous *denial* of class certification. It held that, "when a District Court erroneously denies a procedural motion, which, if correctly decided, would have prevented the action from becoming moot, an appeal lies from the denial and the corrected ruling 'relates back' to the date of the original denial." *Geraghty*, 445 U.S. at 406-407 n.11. The Court explained that "[i]f a class had been certified by the District Court, mootness of respondent Geraghty's personal claim would not have rendered the controversy moot" under *Sosna*. *Id.* at 394. "[A]n erroneous *denial* of a class certification should not lead to the opposite result." *Ibid.* Such a rule would let a class action's mootness turn irrevocably on one judge's fallible view about whether a class should be certified. Instead, *Geraghty* recognized an opportunity for judicial self-correction through relation back. If a district court's refusal to certify a class is later found to have been mistaken, the corrected ruling certifying the class will be deemed to have been entered at the time of, and in lieu of, the earlier denial, *nunc pro tunc*. That merely remedies a collateral effect of an erroneous judicial ruling; it reverses not only the erroneous failure to certify, but also the mootness that would have been avoided if certification had been properly granted in the first instance. Cf. *United Gas Improvement Co.* v. *Callery Props., Inc.*, 382 U.S. 223, 229 (1965) ("a court[ ] can undo what is wrongfully done by virtue of its order"). In the eyes of the law, the named plaintiff's claim thus became moot only *after* the class attained separate legal status and additional persons with live claims were brought before the Court. As in *Sosna*, there was always someone with a personal stake in the merits of the case on the plaintiff side of the "v."

The same cannot be said when the named plaintiff's individual claim becomes moot *before* the district court rules on class certification. To the contrary, *Geraghty* explained that, "[i]f the named plaintiff has no personal stake in the outcome *at the time class certification is denied*, relation back of appellate reversal of that denial *still would not prevent mootness* of the action." 445 U.S. at 407 n.11 (emphasis added). In those circumstances, there is an unavoidable gap between the named plaintiff's loss of his personal stake and other class members' assertion of their own. Mootness then is not a collateral consequence of an erroneous order that relation back can avoid: Even if a later order certifying the class were related back to the earlier denial, that would not alter the fact that the action became moot, and should have been dismissed, before the effective certification date.

b. The Third Circuit's expansive interpretation of "relation back" bears little resemblance to the modest corrective tool described in *Geraghty*. Whether in the class-action context or this one, that court's approach erroneously focuses on the certification *motion* rather than the certification *decision*. The Third Circuit's decision in *Weiss* was premised on treating a class certification motion filed after the named plaintiff lost his personal stake "as though it had been filed contemporaneously with the filing of the class complaint." Pet. App. 19a. Similarly, the court here purported to cure respondent's mootness problem by relating her later-filed motion for "conditional certification" "back to the filing of the initial complaint." *Id.* at 28a. But even assuming that the motion could relate back to the complaint, that still would not avoid mootness. *Geraghty*'s relation-back rule rests on the premise that the presence of a duly certified class prevents the named plaintiff's loss of a personal stake

from mooting the entire case. *Geraghty* therefore treats a later-certified class as though it was certified at the time of an earlier erroneous denial of certification, when the plaintiff's claim was still live. *See* pp. 25-26, *supra*.

The Third Circuit's approach lacks that important link. A certification motion, even if *actually* filed simultaneously with a class complaint, does not bring additional persons with live claims before the court. *Pretending* that the motion was filed with the complaint thus adds nothing to the jurisdictional calculus. "Relation back" is not an abracadabra that banishes mootness by its mere incantation. The event being related back must be of jurisdictional significance—such as adding new parties—and a mere motion to certify falls short.

Nor can mootness be circumvented by relating a later certification *decision* back to the filing of the certification *motion*. Some courts have held that such relation back is proper where a plaintiff is tendered full recovery while a class certification motion is pending. See, *e.g.*, *Damasco*, 662 F.3d at 895-896. The Third Circuit may have intended a similar arrangement here, such as relating a certification decision back to the certification motion and then relating the motion back to the complaint. But that approach defies precedent. *Geraghty* stated in no uncertain terms that relation back "still would not prevent mootness of the action" where the named plaintiff "has no personal stake in the outcome *at the time class certification is denied*." 445 U.S. at 407 n.11 (emphasis added). That necessarily means that the plaintiff's loss of a personal stake while a certification motion is merely *pending* does moot the case. Backdating the certification decision to some earlier time when the named plaintiff still had a personal stake (whether that is the filing of the complaint

or the filing of the certification motion) is nothing more than an end-run around *Geraghty*'s clear rule.

Courts have claimed to find support for their distortion of *Geraghty*'s relation-back rule in two sentences of dictum in *Sosna*. See, *e.g.*, Pet. App. 17a (citing *Sosna*, 419 U.S. at 402 n.11); *Sandoz* v. *Cingular Wireless LLC*, 553 F.3d 913, 919 (5th Cir. 2008) (same). In holding that a previously certified class action could survive the named plaintiff's loss of a personal stake, *Sosna* reiterated the fundamental rule that a live controversy must exist "at the time the class action is certified." 419 U.S. at 402. In an accompanying footnote, however, the Court mused that there "*may* be cases" where named plaintiffs' claims become moot "before the district court can reasonably be expected to rule on a certification motion." *Id.* at 402 n.11 (emphasis added). "In such instances," the Court stated, "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." *Ibid.* (emphasis added).

That tentative statement does not license judicial resurrection of any class action that becomes moot before a decision on certification. To the contrary, *Geraghty* made clear that *Sosna*'s dictum merely referred to the traditional "capable of repetition, yet evading review" exception to mootness. 445 U.S. at 398-399. That exception enables review of claims "*so inherently transitory* that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *Id.* at 399 (emphasis added); see also *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 52 (1991); *Gerstein* v. *Pugh*, 420 U.S. 103, 110 n.11 (1975). The suggestion that respondent's dam-

ages claim here was "inherently transitory" because petitioners could offer to pay it in full at any time drains that phrase of all meaning; *all* damages claims are "transitory" in that overbroad sense. Absent true ephemerality, mootness can be prevented only by "certification of a class *prior* to expiration of the named plaintiff's personal claim." *Geraghty*, 445 U.S. at 398 (emphasis added).

2. *Relation Back Cannot Be Extended To FLSA Collective Actions*

Even if it were possible to relate a later *class* certification decision back to the initial complaint to prevent mootness, that approach still could not be superimposed onto cases brought under the *FLSA's* collective-action provision.

The court of appeals' analysis rested heavily on equating the two. Its ruling that respondent's anticipated motion for "conditional certification" (and perhaps a subsequent grant of that motion) would relate back to her complaint, Pet. App. 28a-29a, mirrored the court's treatment of certification motions in class actions, see *id.* at 18a-19a. But FLSA collective actions are, by congressional design, *not* class actions. See pp. 16-17, 22 n.4, *supra*. Unlike certification in a Rule 23 class action, "conditional certification" in an FLSA collective action does not bring any additional persons before the court or otherwise give anyone else "a legal status separate from the interest asserted by" the plaintiff. *Sosna*, 419 U.S. at 399. Rather, as the court of appeals acknowledged, conditional certification "is only the district court's exercise of [its] discretionary power * * * to facilitate the sending of notice to *potential* class members." Pet. App. 12a (quotation marks omitted) (emphasis added). The FLSA is explicit 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." 29 U.S.C. §216(b). An order granting conditional certification therefore does not forestall mootness, even if it were to relate back to the initial complaint. Additional plaintiffs, with their own live claims, are not parties until they *affirmatively opt in* to the lawsuit; until that occurs, they cannot ensure that a live controversy survives extinguishment of the named plaintiff's personal stake in the outcome.

For the Third Circuit's "relation back" theory to work in the FLSA context, one cannot merely relate the conditional certification *motion* and the conditional certification *decision* back to the complaint. One would also have to relate opt-in plaintiffs' later *consent* back to the complaint as well. The statutory text, however, forecloses that approach: It provides that an action under the FLSA "*shall be considered to be commenced* in the case of any individual claimant" only on the "*date on which such written consent is filed.*" 29 U.S.C. §256(b) (emphasis added). Conversely, a claimant's suit may "be considered to be commenced * * * on *the date when the complaint is filed*" only if the claimant "is specifically named as a party plaintiff *in the complaint* and his written consent to become a party plaintiff *is filed on such date*." *Id.* §256(a) (emphasis added). Relating subsequent opt-ins back to the date of the original complaint would flout those statutory commands.

"Mootness doctrine, and [courts'] consequent inability to render judgment on nice hypotheticals or advisory questions, supplies a significant portion of what distinguishes the role of the federal judge from that of the advisor or academic"—or advocate—"in our constitutional order." *Wyoming* v. *Dep't of Interior*, 587 F.3d 1245, 1250 (10th Cir. 2009). Courts improperly blur those lines

when they create novel and unanchored fictions to rescue moot cases that should otherwise be dismissed. Because the decision below does just that, it should be reversed.

CONCLUSION

The judgment of the Third Circuit should be reversed.

Respectfully submitted.

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SEPTEMBER 2012