No. 11-1059

IN THE
Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION, *ET AL.*,
Petitioners,

v.

LAURA SYMCZYK,
Respondent.

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

MOTION OF DRI—THE VOICE OF THE DEFENSE BAR FOR LEAVE TO FILE AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF DRI—THE VOICE OF THE DEFENSE BAR FOR LEAVE TO FILE AS *AMICUS CURIAE*

Pursuant to this Court's Rule 37.2(b), DRI—The Voice of the Defense Bar moves for leave to file the accompanying brief as *amicus curiae* in support of petitioners. Counsel for petitioners has consented to the filing of this brief and that consent has been lodged with the Clerk. Counsel for respondent has withheld consent.

Amicus curiae 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 tools to enable them 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 has lost 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) after the plaintiff lost her personal stake in the outcome.

DRI has a significant interest in the resolution of that question. DRI's members routinely defend clients in col-

lective litigation across the Nation, whether under the FLSA, Rule 23, or other applicable statutes. In view of its broad membership and their experience in such matters, DRI has a unique perspective and insight into the issue. DRI regularly participates as *amicus curiae* before this Court on issues of collective litigation and the need for uniform rules. See, *e.g.*, *Ticketmaster* v. *Stearns* (No. 11-983); *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011).

DRI, its members, and the clients its members represent 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 *amicus*'s view, allowing lawsuits to proceed absent a live controversy between identifiable parties, as the Third Circuit did below, is incompatible with basic principles of fairness and is inconsistent with the judiciary's role in our system of government. And the ruling below has a broad impact. It affects myriad cases under the FLSA: In the 12-month period from 2010 to 2011, "[t]he number of FLSA cases filed in federal court * * * increased more than 15 percent," and "[t]he majority of the cases are collective actions." Shannon Green, *Wage and Hour Litigation is Big—and Getting Bigger*, Corp. Counsel, Mar. 19, 2012, http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202546026856. The decision below will also govern suits brought under various other statutes that incorporate the FLSA's collective-action provision. See, *e.g.*, 29 U.S.C. §626(b) (Age Discrimination in Employment Act). And it has implications for proper application of the case or controversy requirement in numerous other contexts. DRI's experience in studying and litigating these issues allows it to provide a unique perspective to this Court.

For the foregoing reasons, the motion of DRI—The Voice of the Defense Bar for leave to file the accompanying brief as *amicus curiae* should be granted.

Respectfully submitted.

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MARCH 2012

QUESTION PRESENTED

Whether a case becomes moot, and thus beyond the judicial power of Article III, when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's claims.

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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 tools to enable attorneys to provide high-quality, balanced, and excellent service to their clients and corpora-

[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.

tions. 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) even after the 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 statutes. DRI, moreover, regularly participates as *amicus curiae* before this Court on issues of collective litigation and the need for uniform rules. See, *e.g.*, *Ticketmaster* v. *Stearns* (No. 11-983); *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011). DRI, its members, and the clients its members represent 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 *amicus*'s view, allowing lawsuits to proceed absent a live controversy between identifiable parties is incompatible with basic principles of fairness and is inconsistent with the judiciary's role in our system of government. It cannot be reconciled with the principle that actual plaintiffs, not clientless attorneys, should drive litigation. And the ruling has a broad impact. It affects myriad cases under the FLSA: In the 12-month period from 2010 to 2011, "[t]he number of FLSA cases filed in federal court * * * increased more than 15 percent," and "[t]he majority of the cases are collective actions." Shannon Green, *Wage and Hour Litigation is Big—and Getting Bigger*, Corp. Counsel, Mar. 19, 2012, http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202546026856. The decision below will also govern suits brought under various other statutes that incorporate the FLSA's collective-action provision. See, *e.g.*, 29 U.S.C. § 626(b) (Age Discrimination in Employment Act). And the decision's ramifications extend beyond collective-action cases; it has broad implications for class actions and other representative actions, promoting clientless, attorney-driven litigation in those other contexts as well. In view of the profound issues it raises for DRI and its members, DRI urges that the petition be granted.

REASONS FOR GRANTING THE PETITION

The decision below implicates the most fundamental limit on federal judicial power under Article III—the requirement of a live case or controversy between parties with opposing personal stakes in the litigation. "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. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971)). It thereby ensures that federal courts do not invade the province of the legislature by pronouncing unnecessarily on questions of policy or otherwise becoming arbiters in abstract debates. By restricting the judiciary to "the traditional role of Anglo-American courts," the requirement of a live controversy between concrete parties preserves "'the proper—and properly limited—role of the courts in a democratic society.'" *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 492-493 (2009).

The decision below cannot be reconciled with those principles. There is 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 it 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). Because no one has done so, when respondent lost her personal stake in the outcome of this litigation, the case became moot: The court could afford respondent nothing more than she had voluntarily been offered. But the decision below allowed the plaintiffless suit to proceed nonetheless.

That decision has grave implications for defendants and the judicial system. It permits representative actions to proceed, headed not by an actual plaintiff with a

concrete interest, but instead by clientless lawyers seeking a judgment for as-yet-unidentified persons. It deepens a circuit split. The Fifth Circuit, like the Third Circuit here, has held that suits like this one may proceed even after the sole plaintiff loses any personal stake in the outcome of the case. By contrast, the Ninth and Eleventh Circuits have held that such cases are moot. The conflicting rulings have, moreover, resulted in disarray in the district courts. This Court should grant the petition, restore uniformity, and reaffirm that federal courts' proper role is to resolve actual cases or controversies between parties with personal stakes in the outcome—as opposed to arbitrating abstract disputes pursued by counsel years after their client has lost any concrete interest in the outcome.

I. This Court's Review Is Needed To Ensure That The Exercise Of The Federal Judicial Power Remains Confined To Actual 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. The decision in this case eliminates that requirement for a broad swath of cases, allowing them to proceed long after the sole plaintiff has lost any concrete interest in any relief a court might offer. This Court's intervention is required to restore the federal courts to their proper, and properly limited, role.

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 ad-

judicated by Anglo-American courts. See U.S. Const. art. III, §2. Because of that limitation on federal judicial authority, litigants must "demonstrate a 'personal stake' in the suit." *Camreta* v. *Greene*, 131 S. Ct. 2020, 2028 (2011); see also *Summers*, 555 U.S. at 493. 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." *Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983) (quotation marks omitted).

That requirement of a live controversy persists 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); *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 some point during litigation, it is moot and 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) (stating that, when "litigation has ceased to be between adverse parties, * * * the case * * * is not a real one"). Likewise, where intervening circumstances deprive the plaintiff of a "'personal stake in the outcome' of the lawsuit," the suit is also moot. *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). 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). Federal courts do not merely "lack jurisdiction to decide moot cases," *Iron Arrow Honor Society* v. *Heckler*, 464 U.S. 67, 70 (1983); they exceed their constitutional authority under our tripartite system of government when they attempt to do so.[2]

B. Plaintiffless Lawsuits Like Respondent's Defy Article III

The decision below defies those principles. Respondent filed suit under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§207 and 216(b), on behalf of herself and all others similarly situated, alleging that her employer forced its employees to take automatic meal-break salary deductions. Pet. App. 2a-3a. Under the FLSA's collective-action provision, however, respondent remained the sole and exclusive plaintiff. The FLSA declares 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." 29 U.S.C. §216(b). Here, it is uncontested that no other employee gave the neces-

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[2] See, *e.g.*, *Spencer*, 523 U.S. at 7; *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; *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964); see also *Eisler* v. *United States*, 338 U.S. 189, 194 (1949) (Murphy, J., dissenting); *California* v. *San Pablo & Tulare R.R. Co.*, 149 U.S. 308, 314 (1893) ("[T]he court is not empowered to decide 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.").

sary consent to become a party to respondent's lawsuit. Pet. App. 3a.

Two months into this action, petitioners offered the plaintiff a judgment that would provide her with all of the relief she sought. Pet. App. 3a-4a; see Fed. R. Civ. P. 68(a). Respondent "did not dispute the adequacy of the offer as it pertained to the value of her individual claim." Pet. App. 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 thus indisputable that she has nothing to gain from this litigation. As a result, because the sole plaintiff 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.

The court below allowed the case to proceed nonetheless 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 adjudicated, 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).

The potential for other persons to later decide to become parties does not vitiate the strictures of Article III's mootness bar. "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). And "the Article III question is not whether the requested relief would be nugatory as to the world at large, but whether [*the plaintiff*] 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.* Respondent thus seeks to rely, not on her own interest in the case, but on the putative interest of persons who are not before the court—and may never be.

Relying on the possibility that non-parties might become plaintiffs at some uncertain future date is inconsistent with our adversarial system of justice. In our system, cases and controversies are between actual plaintiffs and actual defendants. The court of appeals, however, effectively ruled that having an actual, identifiable plaintiff is unnecessary. 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 plaintiffs'-side lawyers' choosing. But a lawsuit is not supposed to be 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, moreover, 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 this case takes that understandable desire to avoid sunk costs

to an illogical extreme. In this case, the offer of judgment that denied the sole plaintiff any continued interest in the suit 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."). In any event, "[t]his argument from 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. The decision below, and others like it, cannot be reconciled with that principle.

II. Absent Review, Lower Courts Will Continue To Apply This Court's Precedents Inconsistently

The Third Circuit's decision in this case does not reflect an isolated departure from the Constitution's requirement of a live case or controversy between parties with concrete interests. It reflects one side of a well-developed split in the courts of appeals. Relying on this Court's class-action precedents—which permit a putative class representative to appeal denial of class certification even after her individual claim has become moot—several lower courts have allowed FLSA suits to proceed on behalf of unnamed individuals even after the actual plaintiff's personal stake in any resulting judgment has disappeared. That not only defies Article III's case-or-controversy requirement. It also reflects a misunderstanding of this Court's precedents.

This Court has allowed class representatives to proceed with a case despite questions about their continued personal stake on the theory that they retain a pecuniary interest in sharing costs with unnamed class members or a procedural interest in serving as a class representative.

This Court has also suggested that unnamed class members with live claims arguably are "parties" for Article III purposes. But whatever force those rationales have in the class-action context, they cannot logically be extended to this case. An FLSA plaintiff whose own claims have become moot has no comparable interests. Indeed, deliberately designed as a contrast to ordinary class-action mechanisms, the FLSA's collective-action provision expressly provides that potential plaintiffs *are not parties until they opt in* to the lawsuit by written consent. Absent such consent, there is no arguable party other than the named plaintiff who might keep the suit alive. And respondent herself lacks even the collateral interests that this Court has found putative class representatives to possess.

A. Lower Courts Addressing The FLSA's Opt-In Provision Are In Disarray

Over three decades ago, this Court ruled (in two cases decided on the same day) that a putative class representative may appeal a district court's denial of class certification after the representative's own individual claim becomes moot. See *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326 (1980); *U.S. Parole Comm'n* v. *Geraghty*, 445 U.S. 388 (1980). In *Roper*, the Court concluded that named plaintiffs in a suit under the National Bank Act, whose personal claims were mooted after the district court denied certification, could still appeal the denial. 445 U.S. at 340. And 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 after he was released. 445 U.S. at 405-407.

Lower courts are in disarray as to whether *Roper* and *Geraghty* can be extended to collective actions under the

FLSA, so as to permit an action to proceed after the named plaintiff no longer has a personal stake in the case. See Pet. 14-19. Notwithstanding the FLSA's express declaration that no one may be deemed a plaintiff unless they expressly choose to become one, the decision below held such actions can proceed. See Pet. App. 15a-17a, 21a-25a. The Fifth Circuit did as well. See *Sandoz* v. *Cingular Wireless LLC*, 553 F.3d 913, 922 (5th Cir. 2008). By contrast, the Ninth and Eleventh Circuits have concluded that a claim may not proceed once the only plaintiff no longer has a personal stake in the outcome of the case. See *Smith* v. *T-Mobile USA, Inc.*, 570 F.3d 1119, 1122-1123 (9th Cir. 2009); *Cameron-Grant* v. *Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1245-1249 (11th Cir. 2003). The petition thus presents a clear split of authority among the courts of appeals.

The disarray is not limited to the courts of appeals. It also extends to district courts. Numerous district courts have concluded that a plaintiff's loss of a cognizable interest in any resulting judgment moots an FLSA collective action.[3] Other district courts, however, have concluded to the contrary.[4] The outcome of a federal claim

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[3] See, *e.g.*, *Louisdor* v. *Am. Telecomms., Inc.*, 540 F. Supp. 2d 368, 373-374 (E.D.N.Y. 2008); *Darboe* v. *Goodwill Indus. of Greater N.Y. & N. N.J., Inc.*, 485 F. Supp. 2d 221, 224 (E.D.N.Y. 2007); *Ward* v. *Bank of N.Y.*, 455 F. Supp. 2d 262, 267 (S.D.N.Y. 2006); *Rollins* v. *Sys. Integration, Inc.*, No. 05-408, 2006 WL 3486781, at *5 (N.D. Tex. Dec. 4, 2006); *Briggs* v. *Arthur T. Mott Real Estate LLC*, No. 06-0468, 2006 WL 3314624, at *4 (E.D.N.Y. Nov. 14, 2006); *Vogel* v. *Am. Kiosk Mgmt.*, 371 F. Supp. 2d 122, 126-128 (D. Conn. 2005); *Taylor* v. *CompUSA, Inc.*, No. 04-718, 2004 WL 1660937, at *2 (N.D. Ga. July 14, 2004); *Mackenzie* v. *Kindred Hosps. E., L.L.C.*, 276 F. Supp. 2d 1211, 1216-1217 (M.D. Fla. 2003).

[4] See, *e.g.*, *Bowens* v. *Atl. Maint. Corp.*, 546 F. Supp. 2d 55, 79 (E.D.N.Y. 2008) (noting that there "may be [a] lone plaintiff," but stating that the FLSA action was not moot because "other individu-

should not turn on the happenstance of the district or circuit in which the suit is filed. Given the disparate results in different courts, this Court's review is warranted.

B. Lower Court Decisions Misconstrue This Court's Precedents As Authorizing Departure From The Case-Or-Controversy Requirement

Review is warranted for a second reason as well. Decision after decision has undermined the constitutional case-or-controversy requirement by transplanting narrow exceptions, which are limited to certain class-action contexts, into new areas like the FLSA. Those extensions of *Roper* and *Geraghty* overlook the essential differences between opt-out class actions and opt-in FLSA collective actions.

1. In *Roper* and *Geraghty*, this Court concluded that a class-action lawsuit may survive as a live controversy for two distinct reasons. *Roper* states that the named plaintiffs could retain a personal stake "in their 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." 445 U.S. at 336. And in *Geraghty*, this Court stated that, even "after the [named plaintiff's] claim on the merits 'expires,'" he may retain a personal stake in "the claim that he is entitled to represent a class." 445 U.S. at 402.

Roper and *Geraghty*, however, both arose in the Rule 23 class-action context. As this Court has explained, an Article III "controversy" exists "between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named

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als were *interested* in joining" (emphasis added)); *Roble* v. *Celestica Corp.*, 627 F. Supp. 2d 1008, 1013 (D. Minn. 2007); *Morales-Arcadio* v. *Shannon Produce Farms*, 237 F.R.D. 700, 702 (S.D. Ga. 2006).

plaintiff has become moot." *Sosna* v. *Iowa*, 419 U.S. 393, 402 (1975). Likewise, this Court has held that unnamed class members resemble parties in certain respects even before a class is certified. The filing of a class action, for example, "tolls the statute of limitations as to all asserted members of the class," even if unnamed class members are unaware of the suit and even if certification is later denied. *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 350 (1983) (quotation marks omitted); see also *Am. Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 553-554 (1974). That policy is based on pragmatic concerns: "Otherwise, all class members would be forced to intervene to preserve their claims." *Devlin* v. *Scardelletti*, 536 U.S. 1, 10 (2002); see also *id.* at 9-10 ("Nonnamed class members * * * may be parties for some purposes and not for others."). It also reflects the class action's "inherent representativeness," which "means that each putative class member has effectively been a party to the action" since the complaint's filing. *State Farm Mut. Auto. Ins. Co.* v. *Boellstorff*, 540 F.3d 1223, 1232-1233 (10th Cir. 2008) (quotation marks omitted).

Unnamed class members thus take on some of the characteristics of traditional parties. Consistent with that view, this Court has at times referred to unnamed members as "parties in interest," *Smith* v. *Swormstedt*, 57 U.S. 288, 303 (1854), "interested parties," *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356, 366 (1921), and "absent parties," *Hansberry* v. *Lee*, 311 U.S. 32, 42-45 (1940). See *Roper*, 445 U.S. at 343 n.3 (Stevens, J., concurring) (noting these examples). Indeed, Justice Stevens went so far as to argue that, "when a proper class action complaint is filed, the absent members of the class should be considered parties to the case or controversy at

least for the limited purpose of the court's Art. III jurisdiction." *Id.* at 342 (Stevens, J., concurring).

As a corollary, named plaintiffs "have fiduciary duties towards the other members of the class." *Martens* v. *Thomann*, 273 F.3d 159, 173 n.10 (2d Cir. 2001); *Crawford* v. *Equifax Payment Servs., Inc.*, 201 F.3d 877, 880 (7th Cir. 2000); *Sondel* v. *Nw. Airlines, Inc.*, 56 F.3d 934, 938-939 (8th Cir. 1995). They must "represent the collective interests of the putative class" in addition to their own interests, *Roper*, 445 U.S. at 331; see also Fed. R. Civ. P. 23(a)(4), and named and unnamed members of a certified class are bound by any resulting judgment, *Cooper* v. *Fed. Reserve Bank*, 467 U.S. 867, 874 (1984).

2. Whatever the ongoing vitality of those class-action precedents, they cannot be extended beyond their limited foundations—and they certainly cannot be extended to the FLSA. Unlike *Roper*, respondent here has no interest in sharing costs with other employees; petitioners offered to pay her costs and fees in full. Pet. App. 3a-4a. Unlike *Geraghty*, a named plaintiff has no procedural interest in representing other employees; an FLSA plaintiff "does not have a procedural right to represent a class in the absence of any opt-in plaintiffs." *Smith* v. *T-Mobile USA Inc.*, 570 F.3d 1119, 1122 (9th Cir. 2009). And unlike Rule 23, the FLSA creates a "collective action" under which no one is, or becomes, a "party" unless they consent to become one. 29 U.S.C. §216(b). Thus, respondent has no interest in the litigation's outcome.

Nor do unnamed, unidentified employees have a status under the FLSA that even remotely resembles those of parties (or unnamed class members). Congress designed the FLSA's collective-action mechanism to *distinguish* collective suits under the FLSA from class actions and to prevent a flood of suits: "In 1938, Congress gave em-

ployees 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). "No written consent requirement of joinder was specified by the statute." *Ibid.* The ease with which suits could be brought led to "a flood of suits under the FLSA." *Arrington* v. *Nat'l Broad. Co.*, 531 F. Supp. 498, 500 (D.D.C. 1982). For example, "[i]n the seven-month period from July 1, 1946 to January 31, 1947, 1,913 * * * cases were filed in the federal courts," and most "involved very large allegations of liability." *Id.* at 500 n.5 (citing 93 Cong. Rec. 2087-2088 (1947) (remarks of Senator Donnell)).

Less than a decade later, Congress fixed the problem. 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, and the requirement that an employee file a written consent was added." *Hoffmann-LaRoche*, 493 U.S. at 173. The result of that 1947 amendment 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.*; see also *Cameron-Grant*, 347 F.3d at 1248. The opt-in provision thus sought to "prevent large group actions, with their vast allegations of liability, from being brought on behalf of employees who had no real involvement in, or knowledge of, the lawsuit." *Arrington*, 531 F. Supp. at 501.

The differences between opting in under the FLSA and the Rule 23 class action render the two mechanisms "mutually exclusive and irreconcilable." *LaChapelle* v. *Owens-Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir. 1975). Although members of an uncertified class might be con-

sidered "parties for some purposes," *Devlin*, 536 U.S. at 9-10, the FLSA's text forecloses that treatment of potential collective-action plaintiffs: "*No employee shall be a party plaintiff* to any such action unless he gives his consent in writing." 29 U.S.C. §216(b) (emphasis added).

Other aspects of the collective-action device confirm that categorically different approach. Under the FLSA, non-parties do not have their claims tolled when a named plaintiff files a complaint. See 29 U.S.C. §256(a)-(b). Nor are non-parties bound by the outcome of any FLSA suit. And far from owing any fiduciary duties toward non-parties, a named FLSA plaintiff "has no independent right to represent a class that would preserve a personal stake in the outcome for jurisdictional purposes; his right to represent a class depends entirely on whether other plaintiffs have opted in." *Smith*, 570 F.3d at 1123. The opt-in mechanism under the FLSA is thus "a fundamentally different creature than the Rule 23 class action." *Cameron-Grant*, 347 F.3d at 1249; see *LaChapelle*, 513 F.2d at 288 (describing the "fundamental, irreconcilable difference" between the two mechanisms).

Despite those fundamental differences, the decision below superimposed the mootness doctrine as it is applied to class actions onto the FLSA's opt-in provision. See Pet. App. 11a-14a, *id.* at 21a-27a. The Fifth Circuit has likewise stated that the differences between the two mechanisms "do not compel a different result." *Sandoz*, 553 F.3d at 920. But those statements defy the foundations of *Roper* and *Geraghty*. And they ignore the pragmatic rationales underpinning the effort to relax, in the limited context of class actions, the traditional requirement that the actual plaintiff have an ongoing and concrete interest in the judgment. Absent class members, for example, may have sufficient interests, and may be

sufficiently like actual parties, to prevent mootness. The same thing cannot be said of as-yet-unidentified employees who, by statute, are not parties unless they elect in writing to become parties, who have not so elected, and who are as a result not affected by any judgment in the case. Consequently, when the only identifiable plaintiff's claims become moot, so too does the case; no plaintiff with a live claim remains before the court.[5] The Third Circuit's contrary ruling warrants review.

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[5] Nor do any of this Court's other narrowly crafted exceptions to mootness apply to plaintiffless FLSA suits. A case might not be moot if it is "capable of repetition, yet evading review." *Honig*, 484 U.S. at 318 (quotation marks omitted). Under that exception, a case is justiciable if "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975). But allegations of FLSA violations will rarely meet this exception. Here, for example, respondent alleged that a company policy violated the law. Pet. App. 3a. And a case might not be moot upon "a defendant's voluntary cessation of a challenged practice" because the defendant would be "free to return to his old ways." *Laidlaw*, 528 U.S. at 189 (quotation marks omitted). But here, respondent challenges a policy rather than fleeting alleged behavior. Finally, a case challenging the validity of a criminal sentence might not be moot if there is "some concrete and continuing injury other than the now-ended incarceration or parole—some 'collateral consequence' of the conviction." *Spencer*, 523 U.S. at 7. That exception obviously has no application here. In short, because this plaintiffless suit neither satisfies the mootness doctrine's requirements nor meets any of that doctrine's exceptions, it presents no Article III case or controversy.

C. Lower Courts Inconsistently Apply *Roper* And *Geraghty* To Named Representatives Whose Claims Have Become Moot Before A Class Certification Motion Has Been Filed

The current controversy has ramifications that extend well beyond the FLSA and similar statutes. It has profound implications for pre-certification putative class actions as well. While the interests of absent class members may arguably be sufficient to prevent a class action from becoming moot notwithstanding extinguishment of the named representative's claims, the lower federal courts are divided over the circumstances that will support that result. That division reflects broader disagreement over the scope and meaning of *Roper* and *Geraghty*—issues that a decision in this case would resolve.

1. Although *Roper* and *Geraghty* are now three decades old, lower federal courts increasingly struggle to define their scope. For example, some courts, like the Seventh Circuit, hold that a putative class action cannot continue if the named plaintiff loses her personal stake in the case before any class certification motion is filed.[6] Other circuits have ruled the opposite way, permitting a case to continue even if a putative class representative loses her interest in the outcome early in the case, before a class certification motion is filed.[7] More broadly, courts

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[6] See *Damasco* v. *Clearwire Corp.*, 662 F.3d 891, 895 (7th Cir. 2011) ("[A] plaintiff cannot avoid mootness by moving for class certification after receiving an offer of full relief.").

[7] See *Pitts* v. *Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-1092 (9th Cir. 2011) ("[A]n unaccepted Rule 68 offer of judgment—for the full amount of the named plaintiff's individual claim and made before the named plaintiff files a motion for class certification—does not moot a class action."); *Weiss* v. *Regal Collections*, 385 F.3d 337, 348 (3d Cir. 2004) ("Absent undue delay in filing a motion for class certification

are in disagreement over whether a plaintiff who loses a cognizable interest in any resulting judgment prior to class certification may proceed with the lawsuit.[8] As these cases demonstrate, the relationship between pre-certification putative class actions and mootness is unsettled at best.

A decision in this case has the potential to provide much-needed guidance in this unsettled area of law. The uncertainty about the scope of *Roper* and *Geraghty*—whether they apply in class actions before the class certification motion has been filed or, in this case, to FLSA actions before anyone else has met the statutory requirement of consenting to become a party—reflects controversy about the meaning of those decisions and their consistency with this Court's more recent (and more demanding) case-or-controversy precedents. A decision in this case would go a great distance to clarifying the current boundaries of *Roper* and *Geraghty*. This Court has recently announced that an "unnamed member of a pro-

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* * * where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint.").

[8] Compare, *e.g.*, *Damasco*, 662 F.3d at 895 ("[W]e have long held that a defendant cannot moot a case by making an offer *after* a plaintiff moves to certify a class."), and *Lucero* v. *Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1249-1250 (10th Cir. 2011), with *Cruz* v. *Farquharson*, 252 F.3d 530, 533 (1st Cir. 2001) ("Despite the fact that a case is brought as a putative class action, it ordinarily must be dismissed as moot if no decision on class certification has occurred by the time that the individual claims of all named plaintiffs have been fully resolved."). Cf. *Fox* v. *Bd. of Trs. of State Univ. of N.Y.*, 42 F.3d 135, 144 (2d Cir. 1994) (denying named plaintiffs' leave to amend class-action complaint to add another plaintiff, "conclud[ing] that once a case is moot, it is no longer justiciable in federal court and must be dismissed").

posed but uncertified class" generally does not "qualif[y] as a party" subject to a federal court's jurisdiction. *Smith* v. *Bayer Corp.*, 131 S. Ct. 2368, 2379 (2011); *id.* at 2381 n.11 ("an uncertified class action cannot bind proposed class members").[9] This Court should likewise make it clear here that the interests of non-parties—and of individuals who lack specifically identified essential attributes of parties—cannot provide the sole basis for the case or controversy necessary to establish Article III jurisdiction.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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[9] See also *Sosna*, 419 U.S. at 399 ("When the District Court *certified the propriety of the class action*, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant." (emphasis added)); *Bd. of Sch. Comm'rs of City of Indianapolis* v. *Jacobs*, 420 U.S. 128, 129 (1975).