

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GENESIS HEALTHCARE :

4 CORPORATION, ET AL., :

5 Petitioners : No. 11-1059

6 v. :

7 LAURA SYMCZYK :

8 - - - - - x

9 Washington, D.C.

10 Monday, December 3, 2012

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:04 a.m.

15 APPEARANCES:

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17 Petitioners.

18 NEAL KUMAR KATYAL, ESQ., Washington, D.C.; on behalf of
19 Respondent.

20 ANTHONY A. YANG, ESQ., Assistant to the Solicitor
21 General, Department of Justice, Washington, D.C.; for
22 United States, as amicus curiae, supporting
23 Respondent.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 11-1059, Genesis HealthCare
5 v. Symczyk.

6 Mr. Mann.

7 ORAL ARGUMENT OF RONALD MANN

8 ON BEHALF OF THE PETITIONERS

9 MR. MANN: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 The decision of the court of appeals
12 deprives the Defendant of the ability to free itself
13 from litigation, even when it is willing to pay complete
14 relief to the sole Plaintiff; thus, as long as the
15 Plaintiff refuses to accept full and complete payment, a
16 putative collective action must continue onward to
17 certification.

18 JUSTICE GINSBURG: Did that offer include
19 admission of liability?

20 Or was it just that it was going to pay the
21 amount of damages requested?

22 MR. MANN: That's a good question,
23 Justice Ginsburg. Because it was an offer of judgment,
24 if the offer had been accepted, the result would have
25 been a judgment by the Federal court imposing liability

1 under the statute, under the Fair Labor Standards Act,
2 on the Defendant, and requiring the Defendant to pay
3 full and complete relief, including costs and attorneys'
4 fees, to the Plaintiffs. So there would have been a
5 judgment of the Federal court imposing liability under
6 the statute.

7 JUSTICE GINSBURG: So if -- if there were
8 judgment of liability, then that would be preclusive for
9 all other people similarly situated?

10 MR. MANN: Well, I think there is rules of
11 issuing claim conclusion that would flow from the
12 judgment, and it would have --

13 JUSTICE GINSBURG: Well, that -- so the next
14 case is another employee who claims uncompensated work
15 time, and that's brought on behalf of similarly situated
16 people. Then that next case, the employer would be --
17 would be subject to summary judgment because the
18 liability has been established.

19 MR. MANN: Well, there would be a variety of
20 fact questions that would have to be resolved to
21 determine the extent of the preclusion from the first
22 judgment. But the rules of issue and claim preclusion
23 would apply. And to the extent those rules call for
24 matters that were comprehended within the judgment to
25 bind, in a later case, they would.

1 I think the way that I would put it, looking
2 back to Justice Kagan's opinion in the Smith v. Bayer
3 case, it's common for there to be a preclusive effect of
4 a judgment in one case against people that are not
5 parties. And this would have been a judgment imposing
6 liability under the Fair Labor Standards Act, based on
7 the allegations made in the complaint. And that's
8 what --

9 JUSTICE SOTOMAYOR: Counsel, so what am I to
10 make of your transmittal letter which says, in the offer
11 itself, that -- JA 5556, that Petitioners make clear
12 that the offer of judgment, quote, "was not to be
13 construed as an admission that Petitioners are liable in
14 this action or that Respondent has suffered any damage"?

15 What -- what are we to make of that --

16 MR. MANN: Well, let me --

17 JUSTICE SOTOMAYOR: -- when you're now
18 claiming that you would have accepted a judgment of
19 liability?

20 MR. MANN: Well, I don't think that you have
21 to rely on my statements here, to say that we would have
22 accepted judgment of liability at that time. The -- the
23 offer itself has a formal offer of judgment on a form
24 promulgated by the trial court.

25 The offer itself is not an admission of

1 liability. The offer itself is not a judgment against
2 the Defendant. The offer is a statement that, under the
3 ordinary rules for Rule 68, if -- if they accept the
4 offer, there would be a judgment against our client.

5 JUSTICE SOTOMAYOR: How did you pick the
6 \$7,500?

7 MR. MANN: That's detailed later in the
8 Joint Appendix, at pages 77 to 79. But, essentially,
9 what our client did is they took the amount of time for
10 breaks during the Respondent's period of employment and
11 offered her full wages for all of the break time, so
12 that whatever amount of break time was appropriately
13 charged for her --

14 JUSTICE SOTOMAYOR: I see in the -- in the
15 FLSA, that it also requires an amount for liquidated
16 damages. Did you include that amount as well?

17 MR. MANN: Yes, Your Honor -- yes, Justice
18 Sotomayor.

19 CHIEF JUSTICE ROBERTS: Counsel, what if the
20 district court -- this proceeding -- you filed the
21 suggestion of -- of mootness, whatever, and the judge
22 says, okay, I have this suggestion of mootness, I also
23 want to address the certification issue, the mootness
24 argument is scheduled for three months down the road,
25 the certification issue for two months down the road;

1 isn't this just a question of what order the district
2 court wants to address these two issues?

3 MR. MANN: Okay. So there is two things I
4 want to say about that. The first one is to talk about
5 what happened in this particular case, which is the case
6 that's before the Court; and, the second is to discuss
7 the practical consequences of what could have happened
8 in some other case.

9 So what happened in this case is that it was
10 uncontested that the offer provided complete relief.
11 And so the Respondent suffered a judgment to be entered
12 against her because of the conceded acts of the offer.
13 And at the time that judgment was entered, nothing had
14 been done about certification. At the time the offer
15 was entered -- had made -- nothing had been done about
16 certification.

17 So what we --

18 JUSTICE GINSBURG: But it was not possible
19 for anything to be done about the certification because
20 you moved immediately. The complaint is filed, and then
21 you moved -- then you immediately offered the judgment
22 that you did.

23 MR. MANN: Well, I think there is two
24 questions to unpack here that -- that are implicit in
25 both what the Chief Justice is commenting on and what

1 you're commenting on, Justice Ginsburg.

2 One is the question that was presented in
3 the petition, which is: What is the effect on a
4 collective action if, before certification or any motion
5 for collective process has been determined, the sole
6 plaintiff loses the case.

7 The second one is: How do you deal with the
8 housekeeping issues of terminating the interest of a
9 plaintiff when there's no longer controversy between the
10 plaintiff and the defendant?

11 And so --

12 JUSTICE KAGAN: Well, it seems as though
13 it's more than a housekeeping issue that's involved here
14 because -- I mean, I realize that you have an argument
15 about what happens when the plaintiff's individual
16 claims have been fully satisfied, but the plaintiff
17 continues to want to represent other individuals.

18 But, here, the plaintiff's individual claims
19 had not been fully satisfied. She walked away with
20 nothing. She walked away with no judgment, and she
21 walked away with no \$7,500. And the question is: How
22 can it possibly be that her individual claim was moot?

23 MR. MANN: Okay. So I think there is two --
24 again, there's two things to say. One is: We view it
25 as a housekeeping question because it seems to us clear

1 that, if the defendant no longer wishes to contest
2 liability and formally offers to pay all of the relief
3 that the person could possibly win in any formal
4 litigation, it has to be the case that the individual's
5 interest is moot.

6 Now, it might be that the appropriate
7 response is, as is consistent with the Third Circuit, is
8 that the district court should just dismiss the case
9 because, if the person won't take yes for an answer, the
10 Federal court doesn't need anything further --

11 JUSTICE GINSBURG: But there is nothing in
12 Rule 68 -- you're basing the -- your position on a rule
13 that provides as the only sanction, if the plaintiff
14 continues and gets less than the offer of proof, then
15 the plaintiff has to pay the costs. Rule 68 doesn't say
16 anything about dismissing suits.

17 MR. MANN: Well, I don't think our position
18 depends on Rule 68 at all for the mootness. Our
19 position for the mootness is that, if there's no further
20 controversy about the relief that is created by the
21 cause of action, there's nothing more for the trial
22 court to do --

23 JUSTICE KENNEDY: Well, let me ask you
24 this --

25 CHIEF JUSTICE ROBERTS: Justice Kennedy.

1 JUSTICE KENNEDY: Let me ask you just this
2 question -- just tell me as a matter of common practice,
3 do district courts enter judgments against plaintiffs
4 routinely when a full offer of settlement has been made
5 and the defendant just is silent? I mean, does this
6 happen?

7 I just can't remember seeing a -- but
8 this --

9 MR. MANN: There's --

10 JUSTICE KENNEDY: It may -- it may be that
11 it's common practice that, if the plaintiff doesn't
12 reply and there's an offer that's filed with the court,
13 the court says, I haven't heard anything, I'm going to
14 enter judgment.

15 MR. MANN: I think -- I think that the
16 courts of appeals have taken a variety of approaches to
17 what I'm characterizing as a housekeeping question of,
18 if there's no further controversy between the plaintiff
19 and the defendant, how do we move the case off our
20 docket? One approach, which is followed by some of the
21 courts of appeals, is that you enter a judgment against
22 the plaintiff, whether they like it or not.

23 JUSTICE KENNEDY: As a matter of
24 housekeeping, you could --

25 MR. MANN: In favor of the plaintiff -- you

1 enter a judgment in favor of the plaintiff -- that needs
2 to be clear -- in favor of the plaintiff --

3 JUSTICE KENNEDY: Right.

4 MR. MANN: Whether they want a judgment or
5 not, you say, here's everything you asked for; you must
6 take it.

7 Another approach is to say, if they're
8 willing to give you everything to which you're entitled
9 and you won't take it, then there's no reason why we
10 should continue to adjudicate your case because there's
11 not really a controversy. Our --

12 JUSTICE KAGAN: Well, here's what -- here is
13 what the Court said last in Knox last year, when it
14 said, "What makes a case moot?" It says, "A case
15 becomes moot when it's impossible for a court to grant
16 any effectual relief whatever to the prevailing party."

17 Now, here, the judge says, okay, is this
18 case moot? Well, it's not moot because I could give --
19 at the very least, I could give the plaintiff \$7500,
20 but, I didn't give the plaintiff \$7500, so she still has
21 her claim for at least \$7500, regardless of the
22 collective side of this action. I mean, she hasn't been
23 satisfied.

24 MR. MANN: Okay. So let -- let me respond
25 to that. I think Knox flows naturally from Friends of

1 the Earth, and I think they're both saying exactly the
2 same thing. And the -- the -- what's going on in those
3 cases -- and I suppose in the Nike case from last
4 month -- is this general problem of a defendant is faced
5 with a piece of litigation, and they no longer wish to
6 contest it.

7 If the action seeks prospective relief, it's
8 quite difficult, once the case has begun, for the
9 defendant to convince the court that they are going to
10 change their conduct in a way that moots the claim for
11 prospective relief. And this Court's had a series of
12 cases and has often not been convinced of that.

13 In a case that only seeks retrospective
14 relief, it's somewhat easier to convince the court of
15 that. One way would be to formally offer to pay
16 everything the person could get.

17 What happened in this case and what's before
18 the Court is simply if that happens. So what happened
19 here is there was an offer that was conceded to be
20 adequate, and the plaintiff suffered a judgment to be
21 entered against her on the premise that she had no
22 further claim.

23 And the question is, if that interest is
24 gone, which has been conceded at all stages of the
25 litigation, until the bottom side briefing on the merits

1 in this Court, what's the consequences for the
2 collective action?

3 And so what the parties have litigated
4 about -- because this was conceded repeatedly over the
5 course of several years, is what happens when that
6 interest is moot.

7 Now, we believe that it is correct that a
8 defendant, faced with litigation that it does not wish
9 to contest, can terminate the litigation.

10 JUSTICE GINSBURG: What do you do when --
11 when you have a governing statute that says that an
12 employee may bring suit for and in behalf of himself and
13 other employees similarly situated? Can you use a mere
14 rule, Rule 68, to cut out what the statute authors --
15 authorizes; that is, that the employee can seek relief
16 on behalf of himself and others similarly situated?

17 Mustn't you give a chance for the statutory
18 provision to work, which you didn't. By filing
19 immediately, you didn't allow the normal process of
20 inviting opt-ins to occur.

21 MR. MANN: I think that the language of the
22 statute, Section 216(b) of the Fair Labor Standards Act,
23 provides compelling guidance for the case that the court
24 of appeals ignored.

25 In this case, because it's under the Fair

1 Labor Standards Act, the very paragraph you're looking
2 at, Congress has opined -- and I'll say it's only an
3 opinion because the lower courts ignored it. But
4 Congress at least has opined as to how you tell when
5 people that are not yet before the court can be treated
6 as relevant.

7 And the answer is the non-party plaintiffs
8 cannot be part of the case until they formally opt-in --

9 JUSTICE GINSBURG: Yes, but you have to give
10 the plaintiff an opportunity. That --

11 MR. MANN: The -- the statute does not say,
12 if a plaintiff files a case and alleges that other
13 people are similarly situated, the case shall not be
14 dismissed until the court has proceeded to conclusively
15 determine the propriety of certification. It doesn't
16 say that.

17 JUSTICE GINSBURG: Suppose -- suppose the
18 plaintiff had simultaneously, with the filing of the
19 complaint, moved to have it first preliminarily
20 certified as on behalf of other employees situated; so,
21 instead of having the complaint, which was labelled a
22 collective complaint, separate from a motion for
23 certification, they came together, that the plaintiff
24 filed a complaint and immediately filed a motion for
25 certification and a request to discover the names of

1 other people similarly situated.

2 MR. MANN: I think the answer to that would
3 flow directly from this Court's decision in Geraghty.
4 The first question would be: At the time that the
5 defendant's interest becomes moot, who is a party to the
6 case? And the answer would be: Well, there's just this
7 one person.

8 The next question would be: Has the
9 district court ruled on certification in a way that
10 could have erroneously caused the mootness? Well, the
11 answer would be, no, because it became moot not because
12 of an erroneous district court ruling on certification,
13 which was the situation in Geraghty --

14 JUSTICE GINSBURG: So your answer is it
15 wouldn't make any difference?

16 MR. MANN: It wouldn't make any difference.
17 What Geraghty turns on, and -- and I encourage you to
18 look at the portion of footnote 11 that -- the last two
19 paragraphs of that footnote that goes over onto page
20 407, the court emphasizes -- all we're saying here, all
21 we're saying here is that, if the basis of mootness is
22 an error by the district court and if we later ascertain
23 that error, we will not only correct the error about
24 certification, but we will forgive the mootness that
25 flowed from that error.

1 In this court case, there's no suggestion
2 that the district court error caused mootness to occur.

3 CHIEF JUSTICE ROBERTS: Counsel, I don't
4 know that you've answered my question sometime ago, but
5 what -- if the judge can simply order the two
6 determinations in a way that certification is addressed
7 before mootness, does that take care of your problem?

8 Obviously, if you grant certification, there
9 is an ongoing controversy. And under Roper and
10 Geraghty, if you deny certification, the relation-back
11 doctrine applies.

12 MR. MANN: I think that -- that those cases
13 provide a way to analyze that situation. So one
14 possibility is that the district judge grants
15 certification at some moment after the complaint is filed,
16 and then later in time, the sole person who is in the
17 case at that time loses their interest in the case for
18 one reason or another. But --

19 CHIEF JUSTICE ROBERTS: Well, there's no
20 doubt that --

21 JUSTICE SOTOMAYOR: Counsel, I have --

22 CHIEF JUSTICE ROBERTS: I'm sorry. There's
23 no doubt that that -- in that situation, the case goes
24 forward, right?

25 MR. MANN: There is doubt in that case. And

1 we would suggest that it's clear that it doesn't go
2 forward.

3 Under the Fair Labor Standards Act, as
4 opposed to Rule 23, which was at issue in Geraghty, even
5 after the district judge signs an order saying, pursuant
6 to Justice Kennedy's opinion in Hoffman, we should send
7 notices out to see if we can find some new plaintiffs,
8 if none of those people have yet appeared before the
9 court and signed into the case, there is still only one
10 plaintiff.

11 So in Geraghty, it was important to the
12 Court that, when the case got here, although the
13 interest of the named prisoner had been vitiated, there
14 were several people who had filed motions to intervene.
15 And so it appeared that, at all times, there were other
16 people.

17 In this case, by contrast, there's every
18 reason to think that, after the person's interest was
19 vitiated, there were no other plaintiffs because --

20 JUSTICE ALITO: Well, what do you --

21 JUSTICE SOTOMAYOR: Counsel, can I ask a
22 fundamental question under Rule 68? I mean, when I was
23 a district court judge, if parties told me about their
24 settlement discussions, I would get quite upset. But,
25 it says explicitly -- explicitly, "Evidence of an

1 unaccepted offer is not admissible except in a
2 proceeding to determine costs."

3 What authorizes you to use evidence of that
4 offer to argue anything --

5 MR. MANN: So, again --

6 JUSTICE SOTOMAYOR: -- especially when a --
7 the statute gives the plaintiff an absolute statutory
8 right to refuse it at a specific penalty? What permits
9 you to use it as evidence of anything, mootness -- I
10 don't care what you're using it for -- except in cost?

11 MR. MANN: Okay. So I would say two things.
12 The first thing is, of course, the plaintiff did not
13 challenge the use of the offer in the trial court.

14 The second thing, responsive to your
15 question on the merits is, trial courts have considered
16 this question, have generally considered that the offer
17 is admissible by analogy to Rule 408, which deals with
18 settlement discussions more generally, and the Advisory
19 Committee Notes discuss this.

20 And the general idea is the offer is being
21 admitted for a purpose other than to prove the validity
22 or amount of the disputed claim. And so --

23 JUSTICE SOTOMAYOR: This makes no sense to
24 me because, if the offer is for judgment, it has to be
25 proof of validity and amount because, at least you

1 have -- you should be able to get a judgment.

2 MR. MANN: Well, I think that the offer is
3 not being admitted to prove the validity of the
4 plaintiff's claim or the amount of the plaintiff's
5 claim. The offer is being admitted to prove that the
6 plaintiff has no --

7 JUSTICE SOTOMAYOR: But didn't you just tell
8 me that an offer results in an admission of liability
9 and a judgment for a particular amount?

10 MR. MANN: If the plaintiff accepts the
11 offer, then the district judge will enter offer -- will
12 enter judgment for the plaintiff in the amount of the
13 offer.

14 The district courts that have considered
15 this have ordinarily concluded that, in cases where the
16 offer is not accepted and the defendant contends that
17 the offer is complete, that the offer can be admitted
18 for the purpose of proving that there is no controversy
19 between the parties, which is distinct from admitting it
20 for the purpose of proving the validity or amount of the
21 claim.

22 JUSTICE SCALIA: Mr. Mann, could -- could I
23 come back to your response to the question of Knox --
24 the statement in Knox that -- you know, where the court
25 can issue -- can provide no relief, there is -- there is

1 no standing. That -- I would have thought your answer
2 to that is -- is not -- I mean, you -- you answered it
3 on the facts, but that statement was not meant to be
4 exclusive, that that's the only situation in which
5 there -- there is no standing.

6 It was addressing just the third prong of
7 our -- of our standing doctrine, namely the prong that,
8 where the court can issue no relief, the remedial -- the
9 remedial prong, that one of -- one of the elements of
10 standing is the court has to be able to provide relief.
11 But there are other elements to standing as well,
12 including whether there is injury, in fact, and whether
13 the injury is -- you know, springs from the action that
14 is challenged. And those -- those prongs would continue
15 to exist.

16 I didn't think Knox's statement was meant to
17 be all-inclusive, that that's the only -- only way in
18 which standing can be eliminated.

19 MR. MANN: I think that's correct,
20 Justice Scalia. And so the problem that we face here is
21 the -- the questioning relates to something that has --
22 was not disputed below. And our position is a
23 relatively simple one, which is that, under the doctrine
24 of mootness, it has to be correct that, if there is not
25 a controversy between the plaintiff and the defendant

1 about a cause of action that's authorized by law, then
2 the case is over.

3 And that was all conceded below. The
4 plaintiff suffered a judgment to be entered against her.
5 She did not challenge that judgment on appeal.

6 JUSTICE KAGAN: But, Mr. Mann -- excuse me.

7 JUSTICE ALITO: Does the -- can I ask this
8 question? Does the district court have the authority
9 when an offer of judgment is made to hold a hearing as
10 to whether the offer of judgment actually gives the
11 plaintiff everything that the plaintiff could possibly
12 get under the complaint?

13 MR. MANN: We think that's the appropriate
14 response. We think that what should happen is that, if
15 the defendant makes an offer of judgment and -- and
16 files a motion to dismiss, suggesting that it provides
17 complete relief, that if the plaintiff doesn't concede
18 that the case should be dismissed, the district judge
19 should hold a hearing, as the district judge did here --

20 JUSTICE ALITO: But where -- where does it
21 say that in Rule 68?

22 MR. MANN: The proceeding isn't under
23 Rule 68.

24 JUSTICE ALITO: What is it under?

25 MR. MANN: The proceeding is under

1 Rule 12(b), as a motion to dismiss for lack of
2 jurisdiction because the case is moot.

3 See, we don't think that it matters that the
4 offer happened to be made under Rule 68. There are
5 obvious --

6 JUSTICE KENNEDY: Well, your -- your offer
7 says, you hereby offer to allow entry of judgment under
8 Rule 68.

9 MR. MANN: But -- but we don't think that
10 the mootness of the case flows from Rule 68. The
11 mootness of the case flows from the fact that there is
12 not a dispute between the parties about anything a
13 Federal court can handle.

14 JUSTICE KENNEDY: But the -- but the
15 question from Justice Alito was, what happens, does the
16 court have authority to have a hearing?

17 MR. MANN: But the court --

18 JUSTICE KENNEDY: And you said, oh, well,
19 this is not under Rule 68; but -- but you offered to
20 allow entry of judgment under Rule 68.

21 MR. MANN: And the -- and --

22 JUSTICE KENNEDY: And incidentally, you
23 never did follow up and say that you wanted an entry of
24 judgment. You just wanted a dismissal. And that's
25 another point.

1 MR. MANN: Well, because -- because the
2 plaintiff didn't accept the offer.

3 One course of action is we make an offer
4 under Rule 68, and the plaintiff says, all right, let's
5 have a judgment under Rule 68; in which case, there
6 would be a judgment under Rule 68.

7 In this case, the plaintiff said, I'm not
8 interested in Rule 68. And we said, all right. Well,
9 now what we see is a cause of action under Federal law
10 Congress has created that specifies certain forms of
11 relief that are available to the plaintiff. And in this
12 case, there are damages, some liquidated damages, some
13 attorneys' fees and costs. There is no injunctive or
14 declaratory relief.

15 And we have a defendant that is willing to
16 give more than you could possibly get if you win.

17 JUSTICE GINSBURG: Was there attorneys' fees
18 in that offer? I thought there wasn't in --

19 MR. MANN: Yes. Yes, there were. The offer
20 specifically provides for attorneys' fees. And even if
21 the offer didn't provide for attorneys' fees, they would
22 be available under Section 216(b) --

23 JUSTICE BREYER: All right. But this, I
24 take it, is a statutory case, not a constitutional case.
25 That is, do you have any constitutional objection if

1 Congress had said, in 216(b), that Joe Smith and other
2 people similarly situated to Miss Laura Symczyk have a
3 genuine dispute with the employer, and the way they file
4 their case is Miss Symczyk's case will be deemed to be
5 their case as well, though it ceases to be their case,
6 unless they confirm within 60 days of such-and-such, in
7 writing, that it is their case.

8 If Congress passed that statute, there
9 couldn't be a constitutional objection to it, could
10 there?

11 MR. MANN: Well, I think there could be
12 constitutional objections, depending on the details of
13 the statute --

14 JUSTICE BREYER: No, no, no. Do you see
15 what I'm driving at?

16 In other words, if Congress had explicitly
17 said, in 216(b), that the Third Circuit's procedure is
18 the correct procedure for Mr. Joe Smith to bring his
19 case in such circumstances, if they had said that
20 explicitly, is there a constitutional objection? If so,
21 what could it be?

22 MR. MANN: I think the constitutional issues
23 that proposals like that might raise would flow from the
24 decision in Vermont Agency. And the question has to be
25 whether there is a person before the court --

1 JUSTICE BREYER: Oh, we know at least, since
2 we are doing -- I looked up a little bit, but Article
3 III is what was a case or controversy in Westminster in
4 1788 or 1750 or whenever, that in Westminster, in a
5 court of equity, I found at least two instances. A
6 person dies, there is no case with that person, but it
7 remained in equity on the docket until the other person,
8 the -- the estate, came in.

9 A woman could not bring a case if she was
10 married. She starts as a single person. She gets
11 married. Lo and behold, the case remains on the docket
12 until her husband comes in. That's not a happy example,
13 but nonetheless, it's in point.

14 (Laughter.)

15 JUSTICE BREYER: Now, I could find nothing
16 the other way, so I thought of the canon of
17 interpretation that equity deems to have been done what
18 ought to have been done -- or something like that.
19 Others on the Court will know -- but the -- the point
20 is that there are instances --

21 JUSTICE SCALIA: Equity is wonderful.

22 JUSTICE BREYER: What? Yes.

23 It remained on the docket in the Westminster
24 courts, even though there was no plaintiff.

25 So I would ask you again: Is there any

1 counterexample? Is there any instance from equity or
2 elsewhere, where there is a constitutional objection,
3 had they said it, at which point our question is have
4 they said it?

5 MR. MANN: I think the problem is, in that
6 case, there is an identifiable person to substitute. In
7 this case, it's not substituting somebody for the
8 plaintiff. It's leaving the Federal --

9 JUSTICE BREYER: No, no. It's Mr. Joe
10 Smith, if he confirms it in writing.

11 MR. MANN: The -- the problem in this type
12 of case would be that the Federal proceeding would be
13 moving along for a substantial period of time with no
14 plaintiffs. And the district judge's role would be
15 simply to assist the plaintiff in trying to find --
16 plaintiff's counsel in trying to find new plaintiffs.

17 JUSTICE SCALIA: I'll bet you equity could
18 have considered the husband to have been substituted
19 automatically and could have considered that -- the
20 estate to have been substituted automatically. That --
21 that happens when -- when that particular element is --
22 is eliminated. But there is nothing automatic about
23 discovering some new plaintiff who -- who is out -- we
24 don't know who is out there.

25 MR. MANN: On that note, I'd like to reserve

1 the remainder of my time.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Katyal.

4 ORAL ARGUMENT OF NEAL KUMAR KATYAL

5 ON BEHALF OF THE RESPONDENT

6 MR. KATYAL: Thank you, Mr. Chief Justice,
7 and may it please the Court:

8 I'd like to begin with the question of
9 whether a withdrawn Rule 68 offer could moot a case. It
10 cannot. This Court has said that Article III's case and
11 controversy requirement demands both a plaintiff with a
12 concrete injury and a matter where the Court is fully
13 capable of -- of providing relief.

14 CHIEF JUSTICE ROBERTS: I'd like to begin
15 with the question of whether or not you waived that
16 argument.

17 MR. KATYAL: Absolutely, Your Honor.

18 CHIEF JUSTICE ROBERTS: No -- did you waive
19 it or not?

20 MR. KATYAL: We -- We did not waive -- we
21 did not waive the -- we did not waive it. We do think
22 that the brief in opposition should have pointed it out,
23 absolutely. It was a mistake on our part not to -- not
24 to bring to the Court's attention the -- the impact of
25 an unaccepted Rule 68 offer. However, we do think that

1 this Court can -- can consider that, and the reason for
2 that is that it is an answer to the question presented.
3 Indeed, it is literally the question presented.

4 Here is the question presented as -- as my
5 friend Mr. Mann wrote it, whether a court -- "whether a
6 case becomes moot and, thus, beyond the judicial power
7 of Article III when the lone plaintiff receives an offer
8 from the defendants to satisfy all of the plaintiff's
9 claims." And we submit that the answer to that question
10 is no, that the mere receipt of an offer, without more,
11 cannot possibly moot a case.

12 CHIEF JUSTICE ROBERTS: Well, that was not
13 the way the case was presented in the body of the
14 petition, and I would suppose, if that were your
15 objection, that it wasn't received, wasn't accepted, we
16 might have heard about that, as you -- as you suggest.

17 MR. KATYAL: And --

18 CHIEF JUSTICE ROBERTS: And if, in fact, we
19 thought we were dealing with a case in which the Rule 68
20 offer was not accepted, we might have thought
21 differently about whether to grant it.

22 MR. KATYAL: I -- I completely understand
23 that, Mr. Chief Justice. I guess I would say, however,
24 this Court, in Lebron, confronted a similar situation,
25 in which the matter of whether Amtrak was a State actor,

1 was not present in the cert papers; indeed, it had been
2 disavowed, as Justice Scalia's opinion for the Court
3 said.

4 Nonetheless, the Court considered it and --
5 and got into the merits of that question. And we think
6 here, actually, it's an easier case for the Court to get
7 into than Lebron. Both --

8 JUSTICE SOTOMAYOR: I have a question for
9 you, counsel.

10 CHIEF JUSTICE ROBERTS: You -- you rely on
11 the question presented. Your reformulated question
12 doesn't have that feature in it.

13 MR. KATYAL: It does have the unaccepted
14 offer feature in the -- in the question, and of course,
15 this Court's decision in Bray does say that it is the
16 question presented as the Court -- as the Court granted
17 it, that controls.

18 JUSTICE SOTOMAYOR: Counsel, there is --
19 from the beginning, you never accepted the offer.

20 MR. KATYAL: That's exactly right, Justice
21 Sotomayor.

22 JUSTICE SOTOMAYOR: What you appear to have
23 conceded and -- is that the amount of the offer would
24 settle your personal claim.

25 MR. KATYAL: I don't quite think we conceded

1 even that. That's a separate matter. That's about what
2 the terms of the offer were. And our first point to you
3 is to say this offer wasn't even accepted. Mr. Mann is
4 waxing nostalgic about an offer that literally has not
5 given Ms. Symczyk a dime. She is as injured today as
6 she was the day she filed her complaint.

7 JUSTICE KAGAN: What do you think the court
8 should do in that circumstance, where a defendant comes
9 forward and says, I'm willing to satisfy the entire
10 claim? What should happen?

11 MR. KATYAL: If -- we think that, just like
12 the Solicitor General, we think that, in that
13 circumstance, it is possible for a court to enter a
14 default judgment and force relief upon the plaintiff.
15 And we think --

16 JUSTICE KAGAN: Is this under Rule 68? Or
17 is this under some inherent authority?

18 MR. KATYAL: I think it could work either
19 way, so long as the forcing happened within the time
20 period of Rule 68. I don't think like -- the court can,
21 like Lazarus, raise this after it has already been
22 withdrawn. The text of Rule 68 says the offer is now
23 dead. If they had, I imagine, moved for the court to
24 enforce that order -- enforce that offer and enter a
25 default judgment within the 14-day period, then I think

1 that would have been something that might have been
2 possible to do.

3 CHIEF JUSTICE ROBERTS: What -- what benefit
4 does this -- why are you arguing so much? You -- you
5 will have an entry of judgment in the favor of your
6 client who is, according to you, similarly situated to
7 lots of others.

8 Why don't you just -- if somebody comes
9 forward, just take them in, go in, you get a check for
10 \$7500, or whatever it is, you get attorneys' fees, and
11 you can do that as often as you want.

12 MR. KATYAL: For two reasons, Your Honor.
13 The first is, of course, that is precisely what didn't
14 happen here. Ms. Symczyk has zero, not even the
15 \$7500 --

16 CHIEF JUSTICE ROBERTS: Well, I know. But
17 that's the fortuity of the fact that she didn't accept
18 the offer. And we are dealing, perhaps, with a case on
19 the record, as presented to us, where she did accept the
20 offer, if you waive that argument. So -- so assume the
21 case where the offer is accepted.

22 MR. KATYAL: And I think it goes back to
23 what then-Justice Rehnquist said in Roper because what
24 he said is it's not then just about the individual
25 plaintiff. You can't force an offer onto a plaintiff

1 that doesn't have all -- it doesn't award complete
2 relief because, if you do so, it undermines the
3 collective action aspect of the claim.

4 JUSTICE SCALIA: Well, it undermines the
5 collective aspect, if she never brings the suit in the
6 first place. I mean, I -- I must say I'm -- I'm not
7 terribly impressed by the fact that -- you know, if she
8 drops out there is -- there is no collective suit for
9 these other people. There is also no collective suit
10 for these other people if she never appeared in the
11 first place.

12 I don't -- I don't know that the law demands
13 that there be a collective suit. If she doesn't bring
14 suit or if she brings suit and -- and is given
15 everything she wants, the case is over, unless other
16 people have come in.

17 MR. KATYAL: Justice Scalia, we think that
18 the Congress has answered that question, at least in
19 216(b), by providing for both the opportunity to file a
20 complaint on her own behalf, as well as for those that
21 are similarly situated. And so I think that, as Justice
22 Ginsburg said to my -- to my friend, if you adopt their
23 rule, essentially, you truncate that process and
24 eliminate the ability of people to opt in, in any given
25 situation.

1 And that -- for that reason, it's very
2 much -- assuming that we get to this question, that it
3 is very much like Gerstein or Sosna or Roper in that
4 circumstance --

5 JUSTICE SOTOMAYOR: Mr. Katyal, I'm a little
6 troubled that you have given up or argue that the
7 ability to enter a forced judgment is permissible under
8 Rule 68. There is nothing in that rule that gives the
9 court that power, certainly not stated explicitly or
10 even implicitly, because it talks about an entire
11 procedure of accepting the offer or rejecting it, all of
12 it in the hands of the parties, none of it until the
13 entry of the judgment in the hands of the court and only
14 after the plaintiff has accepted the offer in writing.

15 So I can't see anything but an inherent
16 power. So, for me, if there is an inherent power, it
17 has to be under a default judgment because the other
18 side is saying, I give up.

19 MR. KATYAL: Exactly.

20 JUSTICE SOTOMAYOR: All right.

21 MR. KATYAL: That -- that's precisely right.

22 JUSTICE SOTOMAYOR: Let's go from there, at
23 least with me, and that may answer an earlier question
24 about an inquest on damages because that is a part of
25 the requirements for a default judgment, so that if

1 there is a dispute about damages, that can be resolved.

2 But my point is that liability is admitted.

3 Now, let's deal with the Chief's question and Justice

4 Scalia's question, which is in what ways is this

5 comparable to a shared cost, like what motivated our

6 decision in class actions, that the settlement of one

7 existing plaintiff doesn't settle the collective action.

8 How is this similar to that?

9 MR. KATYAL: So we think that the corpus of

10 cases that this Court has handled in the class action

11 area, such as Geraghty and Gerstein and the like, we

12 don't think that they absolutely control this question.

13 I don't want to say that.

14 But we think that they set up two principles

15 that help inform the Court's judgment. The first is

16 that, when you have circumstances like this, in which a

17 claim has gone away as moot because the named

18 representative of the claim has gone away for one reason

19 or another, there is play in the joints.

20 Essentially, you can have a bridge plaintiff

21 who acts to keep the case alive for purposes of letting

22 the class unfold. That's really what then-Justice

23 Rehnquist was getting at in his decision in Roper. And

24 we think there is a lot of force to that because,

25 otherwise, as Justice Ginsburg mentioned, the collective

1 action mechanism doesn't even get off the ground.

2 JUSTICE GINSBURG: Well, you -- you don't
3 accept the argument that I suggested, that is Rule 16 --
4 216, the Fair Labor Standards Act, in saying that you
5 can commence a suit on behalf of others similarly
6 situated, and implicit in that is that there be some
7 decent interval for you to find similarly-situated
8 people?

9 MR. KATYAL: We absolutely agree with that,
10 and we think that's precisely the problem. And this
11 case illustrates it, Justice Ginsburg, because they --
12 we filed their complaint, and 75 days later, they filed
13 their preemptive Rule 68 offer. And now, they are
14 coming before the Court and saying something even more
15 radical than I think any court has accepted, to my
16 knowledge, which is even filing a class certification
17 motion along with the complaint wouldn't be enough.

18 That is something that would essentially cut
19 the heart out of the collective action mechanism
20 altogether.

21 JUSTICE GINSBURG: Why didn't -- why didn't
22 you file the -- the motion for certification, along with
23 the complaint?

24 MR. KATYAL: Because the text of Rule -- of
25 216(b) provides for two different processes, both the

1 filing of the complaint and then a subsequent opt-in
2 process. I suppose we could have done that. That's
3 what the Seventh Circuit has said to do in a case called
4 Damasco, but this Court's decision in Hoffman-LaRoche
5 says the entire collective action mechanism depends on
6 notice and discovery to find out who those people are,
7 to find out and make sure that they are similarly --

8 JUSTICE GINSBURG: But you could -- you
9 could have done that with the complaint and I don't --
10 you say you want to get joiners, so why do you have to
11 wait? Why -- why wouldn't you -- why wouldn't the most
12 logical thing be to say, court, we have labelled this a
13 collective action, and now, we want to start the ball
14 rolling in getting certification?

15 MR. KATYAL: Your Honor, that is what we
16 did. You know, we -- we asked the district court, right
17 after the Rule 68 offer expired, within 4 days, to say,
18 please set up a class certification process. And that
19 process was then interrupted by their subsequent motion,
20 after the Rule 68 offer had expired, to say, this case
21 is moot.

22 CHIEF JUSTICE ROBERTS: It doesn't matter in
23 terms of what the judge is supposed to do with your
24 motion to certify, if nobody else is in the case? I
25 mean, isn't that one of the factors?

1 I don't know if it's even a sort of
2 good-faith pleading if -- if -- you want certification,
3 but there is no nobody else there.

4 MR. KATYAL: That's precisely, Mr. Chief
5 Justice, why we think the Seventh Circuit rule doesn't
6 make much sense. To come in and to ask for
7 certification before you've conducted the discovery and
8 gotten the names, we think is really not the right way
9 to go.

10 Rather, I think this Court's decisions in
11 Iqbal and Twombly suggest that you've got to have some
12 good-faith belief before you go and file a motion for
13 class certification. And I'd be very hesitant for this
14 Court to -- to recommend a rule to litigants that says
15 go and file your motion for class certification right
16 away.

17 This Court, in McLaughlin, I think,
18 essentially said that it's not about the timing of when
19 that motion for certification unfolds. At 500 US page
20 68, the Court said, "The fact the class was not
21 certified until after the named plaintiffs' claims had
22 become moot does not deprive the Court of jurisdiction.
23 We recognize in Gerstein that some claims are so
24 transitory" -- "inherently transitory that the trial
25 court will not even have enough time to rule on a motion

1 for class certification."

2 JUSTICE BREYER: Well, you're
3 interpreting -- I think it's true that we're
4 interpreting the statute, and -- and I'm trying to look
5 at what document are we interpreting? Is there a
6 different rule or a different -- what -- what rule?

7 So I could come back to the statute. And
8 Congress could deprive -- could provide exactly the
9 system that you suggest. I don't see anything
10 unconstitutional about it. But isn't it a little hard
11 to read this statute as providing that mechanism, since
12 what it says is no party shall -- no -- you know, it
13 says what it says in the last two sentences.

14 How do we read that to foresee the mechanism
15 that you're talking about?

16 MR. KATYAL: Right. I take it this is
17 Mr. Mann's point, that people who aren't yet opted into
18 a class are not parties, and, therefore, the Court can't
19 properly consider them. And I think that's the same
20 exact thing in the class action context, is this
21 question --

22 JUSTICE BREYER: Well, he says the
23 difference in the class action context is, in the class
24 action context, you can consider them there, but there
25 isn't a specific sentence somewhere in a statute, which

1 says, no one shall be a party unless he signs in
2 writing.

3 MR. KATYAL: Your -- Your Honor, I think
4 nothing turns on their designation as party status or
5 not; rather, the relation-back doctrine, to the extent
6 the Court wants to get into it and deem this offer where
7 we got nothing, somehow, they want to deem it against
8 us, but if it does and wants to get into the
9 relation-back doctrine, I think it would find that it is
10 based on the idea that the cases would otherwise go
11 away, and that you need a bridge plaintiff --

12 JUSTICE BREYER: Well, why? Why?

13 MR. KATYAL: And it's a very important
14 reason --

15 JUSTICE BREYER: Because that's -- why?
16 Why, is my question?

17 MR. KATYAL: The reason for that goes back
18 to this Court's decision in *Flast* -- in *Flast*, in which
19 it said that, in the kinds of cases we're talking about
20 here, it's not as if we're risking a merits judgment in
21 which relief is going to be imposed against one party
22 and possibly trench on the separation of powers.

23 Rather, the worst that happens, if you rule
24 for us, or if you rule for the plaintiffs in those
25 cases, is that the case goes back down on remand to find

1 out whether or not any of those parties can be
2 identified and come forward. If they do, then you can
3 reach the merits.

4 But this is a very different separation of
5 powers inquiry than the one -- in the case in
6 controversy inquiry than the one that the Court
7 traditionally handles.

8 JUSTICE SCALIA: It -- it's hard for me to
9 accept the relation-back doctrine for your purposes
10 when -- when it's clear, under the statute, that if
11 parties come in beyond the statute of limitations
12 period, they're not in. Their -- their entry is not
13 deemed to relate back to the filing of the original
14 complaint, is it?

15 MR. KATYAL: It -- for purposes of the
16 statute of limitations, exactly.

17 JUSTICE SCALIA: For purposes of the statute
18 of -- so you want one relation-back doctrine for the
19 statute and a different one for what we're discussing
20 here.

21 MR. KATYAL: Absolutely. And we think,
22 actually --

23 JUSTICE SCALIA: I know you do.

24 MR. KATYAL: And -- and, Justice Scalia, we
25 think that that statute of limitations argument cuts the

1 other way.

2 So the statute of limitations provision,
3 which is Section 255, says that, "in determining when an
4 act is commenced for purposes of the statute," and so we
5 don't think it bears on the question or not of whether
6 relation back applies.

7 Much to the contrary, the real worry in the
8 class action context -- and, indeed, my friend's opening
9 line is, "These cases are going to linger forever, and
10 the defendants are going to have no tool."

11 But in the Fair Labor Standards Act context,
12 actually, it's the very reverse because every day counts
13 against the plaintiffs and their counsel. They are
14 incentivized to bring these cases quickly because the
15 clock is literally ticking.

16 And so you don't have, I think, the same
17 worry that you do in the regular class action context of
18 one plaintiff, who can essentially save the day for all
19 of the different -- for all of the different parties.

20 JUSTICE KAGAN: Mr. Katyal, if we do get to
21 the question that Mr. Mann wants us to raise, you spend
22 a lot of time talking about McLaughlin and talking about
23 Gerstein. Those cases were about prospective relief.
24 You're asking for retrospective relief. Why doesn't
25 that make a difference?

1 MR. KATYAL: We think that it is a
2 difference, but we don't think it's enough to change
3 this. And it's for the reasons that then-Justice
4 Rehnquist said in Roper.

5 Here -- here is what he said -- this is at
6 445 US 341. "The distinguishing feature here is that
7 the defendant has made an unaccepted offer. The action
8 is moot in the Article III sense, only if this Court
9 adopts a rule an individual seeking to proceed as class
10 representative is required to accept a tender of only
11 his individual claims acceptance need not be mandated
12 under our precedents since the defendant has not been
13 offered all that has been requested in the complaint
14 (i.e., relief for the class), and any other rule would
15 make the questions unreviewable."

16 And it's the same point. He is talking
17 there about a retrospective action for damages. The
18 rule that we are seeking here is no different than what
19 then-Justice Rehnquist said in Roper.

20 JUSTICE KENNEDY: Do we take this case on
21 the premise that you would have objected if a judgment
22 had been entered in your favor for the full amount, plus
23 attorneys' fees?

24 MR. KATYAL: I think you should. And this
25 is in response to what Justice Alito had said in the

1 first part of the argument. It is not as if we didn't
2 ask for a hearing. Absolutely, we asked for a fairness
3 hearing at Joint Appendix page 110 in the district court
4 and then, again, at the Third Circuit.

5 And what we asked for specifically was
6 review of the contours of the offer. This is at Joint
7 Appendix page 110. We said, quote -- excuse me, 111 --
8 "There has been no review and/or approval by this Court
9 of defendant's offer of judgment to the plaintiff," and
10 for that reason, we said, quote, "Dismissal is
11 inappropriate at this early procedural juncture."

12 So this case comes to the Court having asked
13 that particular question about the contours of the
14 offer. We think that an offer that never gave
15 Ms. Symczyk anything is one that didn't make her whole,
16 and for that --

17 JUSTICE ALITO: If I were to -- I'm sorry.
18 If I were to think that the individual plaintiff's claim
19 isn't moot until a judgment is entered into her favor,
20 but that -- but that -- that issue, was not preserved,
21 can you give me an analog that I should think about,
22 with respect to the second question?

23 MR. KATYAL: Sure.

24 JUSTICE ALITO: Should I -- yes.

25 MR. KATYAL: I think that the best way to

1 think about it is the -- the category of cases from
2 Geraghty, Gerstein, and Swisher suggest that if the --
3 if you wanted to hold that offer against us, that you
4 would then say, as Judge Sirica did, the relation-back
5 doctrine looks similar enough to the 216(b) context in
6 this specific area because, otherwise, the 216(b)
7 collective actions won't work the way Congress intended
8 them to work.

9 JUSTICE ALITO: Well, should I assume that
10 this is the same -- the case would then be the same as
11 if a default judgment had been entered in your favor for
12 that amount?

13 MR. KATYAL: I think -- well, it's hard to
14 know how you'd hold that offer against us, in that --
15 and the way in which you did so, I think, informs that
16 second question. And that's part of the reason why we
17 think it is a predicate question.

18 I suppose that, yes, you could say -- one
19 path available is to say it is a default judgment now
20 that is imposed on us, along the lines of the Second
21 Circuit decision; and, if so, then, as the Solicitor
22 General says, at pages 15 to 18, the then-appropriate
23 course would have been for the district court to
24 evaluate whether other people could opt into the class
25 using the procedures of Hoffman-LaRoche.

1 JUSTICE SOTOMAYOR: -- you could get the step
2 -- the Court had to evaluate whether the offer actually
3 met your personal damages claim, too.

4 MR. KATYAL: Oh, absolutely, Justice
5 Sotomayor.

6 JUSTICE SOTOMAYOR: And what you're
7 saying --

8 MR. KATYAL: We were proceeding on the
9 hypothetical.

10 JUSTICE SOTOMAYOR: -- in those pages is the
11 Court didn't even do that.

12 MR. KATYAL: Exactly. I was proceeding on
13 the hypothetical that -- that, for one reason or
14 another, the Court can't reach that question.

15 And we think Lebron absolutely permits this
16 Court to do so. And we think it's prudent for this
17 Court to reach that question first because you can
18 sidestep and avoid what is, undoubtedly, a very
19 difficult constitutional question about exceptions to
20 Article III mootness and the relation-back doctrine.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 We'll hear from Mr. Yang now.

23 ORAL ARGUMENT OF ANTHONY A. YANG,
24 FOR UNITED STATES, AS AMICUS CURIAE,
25 SUPPORTING RESPONDENT

1 MR. YANG: Mr. Chief Justice, and may it
2 please the Court:

3 Respondent has never been compensated for
4 her individual damage claim, nor has she received a
5 court judgment favorably adjudicating that claim. It
6 follows that her individual claim remains live, as does
7 this collective action.

8 More generally, a settlement offer does not
9 moot a claim, if it is not accepted. Individual freedom
10 of contract is basic to our legal system, and mutual
11 assent is always a necessary element for any settlement.
12 Rule 68 embodies those principles.

13 JUSTICE BREYER: How does that differ from
14 an employee who says that he is annoyed for a variety of
15 reasons at the employer, and he sues the employer for
16 his pay -- for his pay for the month of October. The
17 employer says, He got his pay, I -- I sent him the
18 check, I mean, he gets it every month. And he says,
19 yes, but I didn't cash the check.

20 Is there a case for controversy? He can go
21 sue for his paycheck that he didn't cash?

22 MR. YANG: Well, if you're -- you're -- I'm
23 not sure what the injury would be in that case.

24 JUSTICE BREYER: Okay. So why is it any
25 different when the -- the defendant -- employer says,

1 here's the check.

2 MR. YANG: Well, there's a difference --

3 JUSTICE BREYER: And he says, oh, I didn't
4 cash it.

5 MR. YANG: This -- this I think speaks
6 somewhat to Justice Scalia's point earlier on, which is
7 there -- there are three elements to Article III
8 standing, and it also carries through a bit to mootness.

9 One is an injury in fact. When we are
10 talking about retrospective claims, there is a past
11 injury. If you get a payment or court redress, it
12 doesn't eliminate the injury. The injury continues to
13 exist. Redressability --

14 JUSTICE BREYER: Now, we have a case if the
15 employer, for some reason -- a mistake in bookkeeping or
16 something -- didn't send the check on time, so it
17 arrived 3 days late. And he says, ha, I'm not cashing
18 the check; now, I can sue him. Right? That's your
19 theory.

20 MR. YANG: Well, if there is a violation of
21 the Fair Labor Standards Act -- and I'm not sure that
22 that would be a violation of the Fair Labor Standards
23 Act --

24 JUSTICE BREYER: No, no. He -- he -- it's a
25 contract -- you know. He -- he is paid every month, the

1 end of the month.

2 MR. YANG: Well, if there is a breach of a
3 contract, that is an injury. And it is a past --

4 JUSTICE BREYER: Even though the -- the
5 employer gave him the paycheck. He just didn't cash it,
6 plus the damage is for the 3 days.

7 MR. YANG: If I can just finish, I think it
8 is a past injury. It is traceable to the defendant, and
9 it is redressable because the requested relief would
10 redress it. There may well be a defense on the merits.
11 It may well be that there was payment. It could --
12 there could be accord and satisfaction --

13 CHIEF JUSTICE ROBERTS: I'm not sure I
14 understand. You think there is a live case, not if he
15 doesn't cash it, but I guess, as Justice Breyer was
16 asking, if it's a day late? You -- you said, well,
17 there was a past injury, it was a day late, it -- it --
18 you know, could be redressed, by telling him what? Pay
19 him again? Or --

20 MR. YANG: Well, no. I -- I guess there is
21 a few questions. If they -- if the defendant had paid
22 the plaintiff, then you would have what is traditionally
23 known as -- and it's accepted -- you would have accord
24 and satisfaction. It is an affirmative defense in
25 Rule 8(c).

1 CHIEF JUSTICE ROBERTS: Well, you would also
2 have what's usually known as no injury.

3 MR. YANG: Well, again, I think it's
4 important to distinguish between injury and something
5 that redresses an injury. Redress of an injury, like a
6 court redress, which is the only question that's
7 relevant in Article III, whether the requested relief
8 from the court would redress the injury.

9 Now --

10 CHIEF JUSTICE ROBERTS: So you think a court
11 has to go through the whole process of a trial if the
12 check is a day late and the employer says, I'm sorry,
13 here's -- you know, whatever the interest is on the
14 check?

15 MR. YANG: No, certainly not. And this is
16 what -- what we say is the right approach, although it's
17 not a question of mootness, if an employer comes in and
18 throws up their hands in court and says, it's not worth
19 it, I want to forfeit, I want to just pay the
20 judgment -- and -- and by the way, this would not have
21 the issue preclusive effect, notwithstanding my friend's
22 statement earlier --

23 CHIEF JUSTICE ROBERTS: I'm sorry. Could
24 you directly answer my question about --

25 MR. YANG: The court can simply enter

1 judgment. It can simply enter judgment to -- to stop
2 pointless litigation. That's the normal course, is
3 that, if there is a past injury, it's redressable, but
4 the defendant comes in and either says accord and
5 satisfaction and says that there is no merits claim --

6 CHIEF JUSTICE ROBERTS: Yes.

7 MR. YANG: -- or I just give up on the
8 merits --

9 CHIEF JUSTICE ROBERTS: Or the plaintiff
10 says no -- no standing.

11 MR. YANG: Well, no. Again, I -- I don't
12 think it's a question of standing because there is two
13 issues going on. Standing has to exist at the beginning
14 of the suit. It's assessed at the date that the
15 complaint is filed.

16 CHIEF JUSTICE ROBERTS: And -- and, as we've
17 said, at every stage of the litigation.

18 MR. YANG: Right. That's the -- the
19 mootness inquiry, then. It has to continue to persist
20 throughout the litigation.

21 Now, the fact that you have had some redress
22 of some sort in the form of a private contract, that
23 doesn't eliminate the past injury, nor does it mean that
24 the court could not, if the court were to give
25 additional damages relief --

1 CHIEF JUSTICE ROBERTS: So if you're due --
2 if you're due \$100 from your employer, it's a day late,
3 he gives you \$100, and he says, well, here's another
4 dollar for interest, that, as you said, doesn't
5 eliminate the past injury?

6 MR. YANG: It doesn't eliminate the injury.
7 It might be compensation for the injury. The injury
8 would -- once a past injury occurs, it's there.
9 It's unlike a prospective injury, which can be stopped.
10 When you -- when you seek injunctive relief, you need
11 have to have an imminent on ongoing injury. If the
12 defendant stops, that can eliminate the injury, and then
13 you go into questions of voluntary cessation. But with
14 respect to past injury, it's quite different.

15 Now, I think the possibility of courts
16 wasting their time on this cases is quite small. There
17 is all kinds of incentives for a plaintiff not to bring
18 these suits. There is questions of vexatious
19 litigation. But that's not what we have here. We have,
20 in the Fair Labor Standards Act, a judgment by Congress
21 that employees are to have a right in the -- to -- to go
22 forward in the collective form.

23 And as Justice Kennedy's opinion for the
24 Court in Hoffman-LaRoche recognizes, Section 216 imposes
25 upon district courts a managerial responsibility to join

1 plaintiffs in an orderly way. And the -- the collective
2 action ties in with other aspects of the Fair Labor
3 Standards Act. The action is designed, as
4 Hoffman-LaRoche says, to serve the important function of
5 preventing violations.

6 It also says that the -- the collective
7 action is to be enforced to the full extent of its
8 terms. These are judgments that Congress made because
9 they were trying to protect particularly vulnerable
10 employees in our society. These are nonunionized,
11 generally, low-wage employees without bargaining power.
12 Congress created liquidated damages in order to provide
13 a strong deterrent for employers to comply with the law.

14 And also --

15 JUSTICE SCALIA: Mr. Yang, would -- would
16 you continue with what you started speaking to, issue
17 preclusion, because I'm -- I'm also -- I think it's
18 questionable whether there would be issue preclusion on
19 the basis of a judgment issued with the concession of
20 the defendant.

21 MR. YANG: Yeah. This -- this is page 14,
22 footnote 2 of our brief. Issue -- there might be claim
23 preclusion, in that the defendant would not be able to
24 bring other claims associated, res -- traditional res
25 judicata.

1 But for a judgment entered by a concession,
2 the actual issue is not litigated and necessary to the
3 judgment. And so it's well established that that would
4 not serve any issue preclusive effect. And in fact, I
5 think, if it did, it would put a chill on the ability of
6 people to settle their disputes through offers of
7 judgment.

8 So our solution that we provide the Court,
9 we think, is the only solution that provides a practical
10 way to accommodate the very important interests that are
11 at issue in this case.

12 One, it recognizes the district court's
13 discretion to resolve the case in a sensible way, in
14 order to --

15 JUSTICE KAGAN: So, Mr. Yang, do you think
16 it would be -- I -- I mean, I take the point completely
17 that judgment was rendered against the wrong party here.
18 But if the judgment had been rendered against
19 Ms. Symczyk -- for Ms. Symczyk, but -- but the court had
20 done so prior to looking at the whole class question --

21 MR. YANG: Right.

22 JUSTICE KAGAN: -- do you think that that
23 would be an abuse of the court's discretion? Do you
24 think that the court has to look at the class question
25 before rendering judgment for an individual plaintiff?

1 MR. YANG: In the context of a collective
2 action, yes, because of the Congressional policy that
3 gives plaintiffs a right to proceed collectively.

4 That said, the collective process does not
5 have to be a burdensome one. There are certain small
6 claims, idiosyncratic claims, that a court can simply
7 look at the -- the allegations and say, there are not
8 going to be similarly situated people here.

9 But when we have an allegation like we have
10 here, which there is a widespread policy of deducting 30
11 minutes a day, notwithstanding the employer's knowledge
12 that the employers -- employees are working through that
13 lunch break, there is every reason to think that there
14 is a substantial body of -- of employees similarly
15 situated.

16 And it would be an abuse of discretion for
17 the Court not to proceed at least down that road,
18 provide some discovery, facilitate class notice -- as
19 the Court in Hoffman-LaRoche recognizes is the
20 appropriate thing to do under Section 216 -- and at the
21 end of that process, which could be short for some
22 cases, a little longer for some, should be, of course,
23 always exercised in the Court's sound discretion.

24 At the end of the case, if there are more
25 plaintiffs who opt in, then it proceeds as a collective

1 action. If it remains the single plaintiff, the Court
2 might decide to enter judgment.

3 Now, we don't think that follows, Justice
4 Sotomayor, from Rule 68. It simply follows from the
5 fact that a defendant is willing to just to pay, to
6 give up. It won't have issue-preclusive effect, it
7 resolves the dispute, judgment in the amount of \$7,500,
8 attorneys' fees, costs.

9 JUSTICE SOTOMAYOR: But what you're talking
10 about is imputing into this process, a fairness hearing,
11 essentially, to see, by the district court, to determine
12 whether this is a quirky case where you entered a
13 judgment and you don't need a collective action or
14 whether or not this is a genuine case that requires
15 joining plaintiffs.

16 MR. YANG: May I answer the question,
17 Mr. Chief Justice?

18 CHIEF JUSTICE ROBERTS: Certainly.

19 MR. YANG: I don't think it's a fairness
20 hearing. I think what it does is -- it -- it's a
21 question about whether there are people similarly
22 situated. And if there are plaintiffs similarly
23 situated, the case should proceed. If, at that point,
24 the defendant wants to pay everyone, it certainly could
25 do so.

1 But my guess is, usually, the -- the claims
2 would be litigated on the merits of that.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 MR. YANG: Thank you.

5 CHIEF JUSTICE ROBERTS: Mr. Mann, you have
6 four minutes remaining.

7 REBUTTAL ARGUMENT OF RONALD MANN

8 ON BEHALF OF THE PETITIONERS

9 MR. MANN: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 I think the most useful thing to do is to
12 address the point that Justice Breyer has raised several
13 times because I think it's important to discuss the
14 relationship between what I would call the statutory
15 facts and the constitutional questions that they might
16 raise. And so I do think it's fair, in a sense, to
17 think about this as a statutory case.

18 When a plaintiff files suit in a Federal
19 court, often, the cause of action rests on a statute
20 that Congress has adopted. Those statutes have a lot of
21 attributes that Congress can control to make it easier
22 or harder for a defendant to make an offer of complete
23 relief.

24 They can provide for mandatory shifting of
25 attorneys' fees, as this one does. They can alter the

1 rules for shifting costs, as perhaps the Fair Debt
2 Collection Practices Act does from last month. They can
3 provide for injunctive or declaratory relief, which
4 makes it basically impossible.

5 But Congress gets to decide, when they write
6 a statute, whether they want to make it a statute for
7 which it --

8 JUSTICE BREYER: All right. That's true.
9 And so what we would be reading into this statute is a
10 relation-back doctrine, which happens every day of the
11 week in class action cases and has historical analogies.

12 So I understand the difference you're
13 pointing to, but why not read that in? It would be
14 fair, and it would get the job done, that Congress sets
15 up in the statute. That's the argument the other way.

16 MR. MANN: Well, that leads me to the second
17 point I wanted to make, which is exactly what is the
18 constitutional problem. And I think the way to get to
19 it is when my colleague, Mr. Katyal, refers to the worst
20 that happens, well, the worst that happens, I think
21 it's -- it's important to understand what the worst
22 thing is that happens.

23 The worst thing is -- that happens is the
24 case is on the docket of the Federal district judge, and
25 there is no plaintiff with an interest, and the

1 procedure in the district court is we should spend some
2 time, have some discovery, look around to see if we can
3 find another plaintiff.

4 And so I think that that's a different
5 problem from how the district court should decide the
6 order of hearing -- of deciding motions. If the problem
7 is --

8 JUSTICE GINSBURG: Mr. Mann, if this is --
9 if what Mr. Yang just told us is so, then there would be
10 no issue preclusion because there has been no -- been no
11 adjudication of anything. Then it seems to me that this
12 case falls into a classic exception to mootness, which
13 is defendant's voluntary cessation doesn't moot a
14 controversy. And this controversy is capable of
15 repetition yet evasive review because every time -- so
16 the plaintiff's got this judgment, not preclusive.

17 The employer continues in the old ways. The
18 plaintiff sues again. This seems to me to fit exactly
19 into that category of cases. If there is no issue
20 preclusion, defendant doesn't have to stop the practice,
21 can continue the practice, and then every time there is
22 a suit say, okay, we'll pay the judgment.

23 MR. MANN: So I spoke unartfully before.
24 Obviously, there is a difference between claim
25 preclusion and issue preclusion. And what I was

1 attempting to say, unartfully, I will agree, was the
2 extent of preclusion will depend on the issues that are
3 actually litigated in the proceeding.

4 And so I don't --

5 JUSTICE GINSBURG: But there is nothing
6 litigated when you have --

7 MR. MANN: Claim preclusion is going to
8 apply because there's a judgment by --

9 JUSTICE GINSBURG: Claim preclusion, but the
10 claim is, for this period of time, I wasn't given the
11 compensation. That's the claim.

12 MR. MANN: But it is --

13 JUSTICE GINSBURG: And then there is another
14 period of time, and there is no issue preclusion.

15 MR. MANN: But in this particular case,
16 there's no further dispute likely to occur between these
17 parties. These -- she no longer works for us. There is
18 no reason to think she is going to work for us again.

19 The Court has extended the "capable of
20 repetition, yet evading review" to class actions in
21 three cases: Gerstein, Riverside, and Swisher. In --
22 but in those cases, what happened was the plaintiff
23 sought prospective injunctive relief. The case became
24 moot.

25 If the Court had held that those cases were

1 outside of Article III, the result would have been that
2 the defendant could have been -- could have been
3 engaging in the conduct that allegedly violated Federal
4 law and would never have had to change.

5 In this case, what happened -- in this case
6 and in the cases like this, what happens is someone
7 seeks purely prospective -- retrospective relief for
8 something, an injury that is complete. Except for their
9 attorneys, she would have received complete relief. We
10 didn't engage in our conduct any longer.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 The case is submitted.

13 (Whereupon, at 11:05 a.m., the case in the
14 above-entitled matter was submitted.)

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