No. 11-1059

In the Supreme Court of the United States

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

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN HEALTH CARE ASSOCIATION, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, THE NATIONAL CENTER FOR ASSISTED LIVING, AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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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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INTEREST OF *AMICI CURIAE*

Amicus curiae the Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing 300,000 direct members and representing indirectly the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every geographic region of the United States.[*] An important function of the Chamber is to represent the interests of its members by participating as *amicus curiae* in cases involving issues of national concern to American business. Cases raising significant questions for employers subject to potential class or collective actions are of particular concern to the Chamber and its members. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012) (addressing level of deference owed Department of Labor's interpretation of Fair Labor Standards Act in collective action where Chamber submitted petition- and merits-stage *amicus* briefs advocating stability and clarity in statutory enforcement); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (addressing standard for class certification in case where Chamber submitted petition- and merits-stage *amicus* briefs advocating strict compliance with Rule 23 requirements).

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[*] No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners have filed a letter with the Clerk granting blanket consent to the filing of *amicus* briefs. Respondent's written consent to the filing of this brief has been filed with the Clerk.

Amicus curiae the American Health Care Association (AHCA) is the Nation's largest association of long-term and post-acute care providers, representing the interests of nearly 11,000 nonprofit and proprietary facilities. AHCA's members are dedicated to improving the delivery of professional and compassionate care to more than 1.5 million frail, elderly, and disabled citizens who live in nursing facilities, subacute centers, and homes for persons with developmental disabilities. AHCA advocates for quality care and services for frail, elderly, and disabled Americans. In order to ensure the availability of such services, AHCA also advocates for the continued vitality of the long-term and post-acute care provider community.

Amicus curiae the National Federation of Independent Business (NFIB) is the Nation's leading small business advocacy association, representing members in Washington, D.C., and in all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents approximately 350,000 member-businesses nationwide and its membership spans the spectrum of business operations, ranging from sole-proprietor enterprises to firms with hundreds of employees. The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the Nation's courts through representation on issues of public interest affecting small businesses. To fulfill that role, the NFIB Legal Center frequently files

amicus briefs in cases that will affect small businesses.

Amicus curiae the National Center for Assisted Living (NCAL) is a federation of state affiliates representing more than 2,700 nonprofit and for-profit assisted living and residential care communities nationwide. NCAL is dedicated to promoting high-quality, principle-driven assisted living care and services with a steadfast commitment to excellence, innovation, and the advancement of person-centered care.

Amicus curiae the Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. SHRM represents over 250,000 human resources professionals who make up its membership. The purposes of SHRM, as set forth in its bylaws, are to promote the use of sound and ethical human resources management practices in the profession, and (a) to be a recognized world leader in human resources management; (b) to provide high-quality, dynamic, and responsive programs and service to its customers with interests in human resources management; (c) to be the voice of the profession on human resources management issues; (d) to facilitate the development and guide the direction of the human resources profession; and (e) to establish, monitor, and update standards for the profession. Founded in 1948, SHRM currently has more than 575 affiliated chapters within the United States and members in more than 140 countries.

Amici have a significant interest in cases presenting important questions under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219. The FLSA

establishes nationwide rules related to minimum wages, maximum hours, and overtime pay. The statute covers more than 130 million workers in every conceivable industry. *See The Fair Labor Standards Act: Is It Meeting the Needs of the Twenty-First Century Workplace?*, *Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce*, 112th Cong. 2 (2011) (statement of Rep. Walberg) (*21st Century Hearing*).

Amici are committed to filing briefs in important cases seeking legal clarity so that their members can comply with all laws, including the FLSA. The vast majority of the Nation's employers dedicate significant time, energy, and resources to achieve such compliance, while at the same time creating much-needed jobs. *Amici* therefore have a significant interest in ensuring that their members are spared the significant burden and expense imposed by private lawsuits prosecuted, not by plaintiffs with a personal stake in the outcome as required by Article III, but by lawyers in search of new clients. The decision of the United States Court of Appeals for the Third Circuit at issue here interprets the Court's Article III jurisprudence to permit exactly that, holding that putative collective actions under the FLSA must continue even though the defendants have offered the only named plaintiff complete relief and no other employee has affirmatively joined the suit.

SUMMARY OF ARGUMENT

Petitioners' brief explains thoroughly why the Third Circuit's decision cannot be reconciled with core jurisdictional limitations imposed by Article III. *Amici* wish to emphasize two additional reasons why the Third Circuit's judgment should be reversed.

First, if left undisturbed, the decision below will further exacerbate the significant burden already placed on employers who have been subjected to an exponential increase in private FLSA litigation. In the past decade alone, the number of FLSA suits filed annually has grown by almost 300 percent, affecting nearly every segment of the national economy. Because the FLSA is a strict-liability statute that requires courts to award attorney's fees to prevailing plaintiffs regardless of the wage amount at issue, and because the FLSA's coverage is subject to considerable uncertainty, employers that reasonably believe they have complied with the FLSA are often forced to settle unmeritorious collective actions rather than face the risk of catastrophic judgments. By holding that putative collective actions under the FLSA must continue even though the defendants have offered the only named plaintiff complete relief and no other employee has joined the suit, the Third Circuit's decision deprives employers of a reasonable means to avoid burdensome FLSA litigation early on, based primarily on the Third Circuit's policy judgment that further discovery and litigation *might* motivate *others* to join a suit being prosecuted by counsel who no longer represents a client with a personal stake in the case's outcome. A judicial system based on such speculation is antithetical to the adversarial system guaranteed by Article III, which is designed to adjudicate only those disputes between actual parties with a live case or controversy.

Second, in endorsing as a perceived necessity continued litigation by private attorneys who no longer represent a client with a personal stake in the case's outcome, the Third Circuit's decision overlooks the

important role played by government enforcement of the FLSA. Congress, which has acted to limit private enforcement of the FLSA by banning representative actions and requiring employees affirmatively to opt in to such cases, has granted the Department of Labor wide-ranging authority to sue on behalf of employees in order to collect unpaid wages and overtime compensation. While subject to its own potential limitations, government enforcement of the FLSA serves as a congressionally authorized repository of power to help ensure that truly meritorious FLSA cases are pursued in the best interests of employees—the statute's sole intended beneficiaries—and not the best interests of plaintiff's lawyers.

ARGUMENT

I. Left Uncorrected, the Third Circuit's Decision Will Further Exacerbate the Significant Burden Already Placed on Employers By an Ever-Rising Wave of Private FLSA Litigation

The Third Circuit concluded that putative collective actions under the FLSA must continue even though the defendants have offered the only named plaintiff complete relief and no other employee has joined the suit. In doing so, the Third Circuit's decision deprives employers of one of the only reasonable means to avoid burdensome litigation in the FLSA context—all in the hope that further discovery and litigation might motivate others to join a suit being prosecuted by counsel who no longer represents a client with a personal stake in the case's outcome. The Third Circuit's decision therefore effectively transforms federal courts into roving commissions seeking evidence of potential wrongdoing involving

parties not before the court, thereby creating an inquisitorial judicial system Article III prohibits.

This is no mere technicality raised in the context of an arcane, rarely asserted statutory cause of action. The past decade has witnessed nothing less than an explosion in FLSA litigation. Statistics published by the Administrative Office of the United States Courts reveal that for the 12-month period ending March 31, 2001, a total of 1,961 FLSA actions were commenced in district courts throughout the United States. *Federal Judicial Caseload Statistics* 46 (2001). For the 12-month period ending March 31, 2011, that number had grown to 7,008—a nearly 300 percent increase. Administrative Office of the U.S. Courts, *Federal Judicial Caseload Statistics* 48 (2011); *see also 21st Century Hearing* at 29 (charting exponential increase in number of FLSA actions).

Two factors are widely credited with driving the drastic increase in FLSA litigation. First, unlike most federal statutes creating private rights of action, the FLSA *requires* a district court to award attorney's fees to a successful plaintiff, regardless of the wage amount at issue. *Compare, e.g.*, 29 U.S.C. § 216(b) ("The court in [an FLSA] action *shall*, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.") (emphasis added), *with* 5 U.S.C. § 552(a)(4)(E)(i) (granting district courts discretion to award attorney's fees in Freedom of Information Act cases); 29 U.S.C. § 794a(b) (granting same in Rehabilitation Act cases); 29 U.S.C. § 1132(g)(1) (granting same in Employee Retirement Income Security Act cases); 29 U.S.C. § 2617(a)(3) (granting same in Family and

Medical Leave Act cases); 30 U.S.C. § 1270(d) (granting same in Surface Mining Control and Reclamation Act cases); 33 U.S.C. § 1365(d) (granting same in Clean Water Act cases); 42 U.S.C. § 1988(b) (granting same in private actions under various civil rights statutes); 42 U.S.C. § 7604(d) (granting same in Clean Air Act cases); *see also* Fed. R. Civ. P. 23(h) (explaining that district courts in certified class actions "may" award attorney's fees if authorized to do so by law or by the parties' agreement). Successful FLSA defendants, in contrast, are not even permitted a discretionary award of attorney's fees.

The FLSA's mandatory attorney's fee provision creates a significant financial incentive for plaintiff's counsel to litigate FLSA cases rather than resolve them on reasonable terms. In fact, it is not uncommon for attorney's fees and costs to dwarf the amount of wages at issue in FLSA cases. *See, e.g.*, *Perrin v. John B. Webb & Assocs.*, No. 6:04-cv-00399, 2005 WL 2465022, at *5 (M.D. Fla. Oct. 6, 2005) (awarding over $7,700 in attorney's fees and costs even though underlying claim was for wages totaling $270); *Spencer v. Cent. Servs., LLC*, No. 1:10-cv-03469, 2012 WL 142978, at *4 (D. Md. Jan. 13, 2012) (awarding over $57,000 in attorney's fees and costs even though underlying claim was for wages totaling $8,750); *see also Allende v. Unitech Design, Inc*., 783 F. Supp. 2d 509, 511 (S.D.N.Y. 2011) ("While the requested attorneys' fees exceed plaintiffs' own recovery in the case, that is of no matter. In FLSA cases, . . . the attorneys' fees need not be proportional to the damages plaintiffs recover . . . .").

Second, the FLSA is a strict-liability statute whose coverage is subject to considerable uncer-

tainty. For example, the FLSA's minimum-wage and maximum-hour requirements do not apply to any individual employed in a "bona fide executive, administrative, or professional capacity . . . , or in the capacity of outside salesman . . . ." 29 U.S.C. § 213(a)(1). The FLSA does not define these terms. Until recently, changes in the Department of Labor's interpretation of the "outside salesman" exemption had caused significant uncertainty and enormous potential liability for pharmaceutical manufacturers. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2162 (2012) (describing regulatory changes promulgated by Department in 2004 and refusing to give deference to interpretation of same contained in Department's *amicus* brief); *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 168-71 (2007) (addressing literal inconsistency within Department's FLSA regulations implementing statutory exemption for domestic workers providing companionship services); *Mortg. Bankers Ass'n v. Solis*, --- F. Supp. 2d ---, No. 1:11-cv-00073, 2012 WL 2020987, at *13 (D.D.C. June 6, 2012) (addressing legal challenge of Department's decision to rescind previous interpretation of FLSA's "administrative" exemption as applied to mortgage loan officers), *appeal docketed*, No. 12-5246 (D.C. Cir. Aug. 8, 2012). Even the most basic question of what constitutes compensable "work" is subject to significant debate. *See 21st Century Hearing* at 25-26 (surveying conflicting judicial decisions).

Against this backdrop of legal uncertainty exists the fact that the FLSA has no intent element. An employer's good-faith belief that it has complied with the statute serves only as a limited defense if subse-

quent judicial decisions interpret the statute differently. Specifically, the FLSA shortens the statute of limitations from three years to two if the employer's violation is not willful, 29 U.S.C. § 255(a), and gives a district court discretion not to award double damages if the employer "shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that [the employer] had reasonable grounds for believing that [its] act or omission was not a violation of" the FLSA, § 260. However, even an employer's reasonable, good-faith belief that it has complied with the statute does not limit the award of attorney's fees.

Therefore, the practical reality is that putative collective actions under the FLSA impose significant costs on employers of every size and in every segment of the national economy. A review of the Department of Labor's website reveals the staggering diversity of private and public employers potentially subject to the FLSA and litigation thereunder. *See* U.S. Dep't of Lab., *Topical Fact Sheet Index*, http://www.dol.gov/whd/fact-sheets-index.htm (last visited Sept. 5, 2012) (listing separate FLSA "fact sheets" targeting employers and employees in such diverse industries as agriculture, amusement parks, automobile dealerships, call centers, car washes, construction, daycare, firefighting, grocery stores, home health care, insurance, law enforcement, lodging, lifeguarding, maintenance, manufacturing, nursing, real estate, retail, roofing, state government, transportation, warehousing, and wholesaling).

The FLSA's collective-action device allows plaintiff's counsel to leverage easily a lawsuit involving a single employee's claim into a lawsuit of nationwide

scope involving tens of thousands of employees. Once that occurs, the pressure on employers to settle is so great that it is the rare case that produces a trial, let alone an appeal of a final judgment entered after trial. As one knowledgeable employment counsel explained recently in testimony before Congress, "when you look at the threat of these lawsuits and you understand the risks of going to trial, decisions are made on a business level to make payments that are dramatic compromises . . . ." *21st Century Hearing* at 52 (statement of Richard L. Alfred, Esq.); *see also id.* at 29 (cataloging recent settlements ranging from $38 million to $135 million in suits brought against employers in the financial-services, insurance, retail, and technology industries).

This phenomenon persists regardless of whether an FLSA violation actually occurred. As the same witness explained:

> If one were to examine the way a collective action works under the [FLSA], one would quickly see that the risks to employers may be enormous. That doesn't mean that employers did anything wrong. Oftentimes, the analysis is that they did not. The problem is, in a collective action, the case may be what is called conditionally certified at the very beginning of the lawsuit with a very low burden. Almost all cases are. That then triggers legal mechanisms that allow the hundreds, thousands, and more people to join the case.

21st Century Hearing at 51.

The Third Circuit's decision therefore deprives employers of a reasonable means to avoid burdensome litigation early on by offering complete relief to the only party before the court claiming injury, all

for the policy-based reason of promoting private enforcement of the FLSA. *See* Pet. App. 25 (concluding that considerations of efficiency and economy "caution against allowing a defendant's use of [offers of judgment] to impede the advancement of a representative action"). Article III, however, does not permit the continuation of litigation based solely on speculation that further discovery and litigation might generate new cases or controversies involving parties not presently before the court. Instead, Article III requires a dispute between actual parties with a live case or controversy who have a personal stake in the case's outcome.

II. The Third Circuit's Decision Overlooks the Important Role Played By Government Enforcement of the FLSA

Since its enactment in 1938, the FLSA has included a mechanism for employees to sue their employers for violations of the statute. *See* Fair Labor Standards Act of 1938, ch. 676, § 16(b), 52 Stat. 1060, 1069 (codified as amended at 29 U.S.C. § 216(b)). As an incentive to bring such suits, employees may recover not only unpaid wages, but an equal amount as liquidated damages, as well as attorney's fees and costs. 29 U.S.C. § 216(b).

Congress has narrowed the scope of the FLSA's private-enforcement scheme over time. As first enacted, the FLSA allowed private actions to be brought "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, *or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees simi-*

larly situated." Fair Labor Standards Act of 1938 § 16(b), 52 Stat. at 1069 (emphasis added).

Congress amended the FLSA less than a decade later, citing concerns over "excessive and needless litigation and champertous practices." Portal-to-Portal Act of 1947, ch. 52, § 1(a)(7), 61 Stat. 84 (codified at 29 U.S.C. § 251(a)(7)). As is relevant here, Congress banned representative actions by deleting the "designate an agent or representative" clause from the FLSA's private right of action. *Id.* § 5(a), 61 Stat. at 87. To ensure that employees have a say over their own interests and that suits are not prosecuted by persons lacking a personal stake in the case's outcome, Congress also added a formal opt-in system whereby "[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." *Id.* (codified at 29 U.S.C. § 216(b)); *see also Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989) ("In part responding to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome, the representative [FLSA] action by plaintiffs not themselves possessing claims was abolished [by Congress], and the requirement that an employee file a written consent was added.").

Importantly, while Congress limited private enforcement of the FLSA shortly after the statute's enactment, Congress later gave the Department of Labor significant power to enforce the FLSA on behalf of employees. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 26, 88 Stat. 61, 73 (codified as amended at 29 U.S.C. § 216(c)). Among other things, the Department "may bring an

action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages." 29 U.S.C. § 216(c). The filing of such an action terminates automatically an employee's private right of action. *Id.* Moreover, willful violation of the FLSA is a crime punishable by fine and imprisonment. § 216(a).

The threat of government enforcement is no "paper tiger." As detailed in recent congressional testimony, government enforcement of the FLSA has become increasingly robust. *See Examining Regulatory and Enforcement Actions Under the Fair Labor Standards Act, Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce*, 112th Cong. (2011) (*Enforcement Hearing*). For example, in federal fiscal year 2011 alone, the Department collected almost $225 million in back wages on behalf of more than 275,000 employees. *Id.* at 8 (statement of Nancy J. Leppink, Acting Wage & Hour Adm'r, U.S. Dep't of Lab.). The Department also recently hired hundreds of additional investigators and upgraded its equipment and technology to handle better complaints regarding possible FLSA violations. *Id.*

Accordingly, in endorsing as a perceived necessity continued litigation by private attorneys who no longer represent a client with a personal stake in the case's outcome, the Third Circuit's decision overlooks the powerful tool of government enforcement of the FLSA. To be sure, government enforcement of the FLSA is subject to its own potential limitations. *See, e.g.*, *Enforcement Hearing* at 2 (statement of Rep. Walberg) (expressing concern regarding overzealous-

ness of Department's FLSA investigatory efforts). Government enforcement of the FLSA nonetheless helps ensure that truly meritorious FLSA cases are pursued in the best interests of employees and not the best interests of plaintiff's attorneys. If an employer's offer of complete relief to a private plaintiff is designed merely to mask a larger problem—a pejorative assumption apparently made by the Third Circuit's decision in this case without any evidentiary support—such efforts will likely prove ineffective after scores of additional employees come forward with similar claims, rendering the use of offers of judgment prohibitively expensive. Tellingly, although respondent asserted that thousands of her former colleagues throughout the United States possessed similar claims, not a single one has stepped forward in the almost three years since this case was filed.

CONCLUSION

For the reasons stated above and in the petitioners' brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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