The *Genesis* Problem: How Unaccepted Offers of Judgment and Mootness Have Complicated Fair Labor Standards Act Litigation

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I. INTRODUCTION

In *Genesis Healthcare Corp. v. Symczyk*, the Supreme Court assumed, but never decided, that a defendant-corporation's offer of judgment mooted a plaintiff-employee's individual claim that her employer regularly deducted 30 minutes for lunch breaks, even

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when she and her coworkers worked during those breaks.[1] Justice Kagan dissented, arguing that the majority answered a question that should not have arisen and, in doing so, missed an opportunity to resolve a split among the Courts of Appeals.[2] Although the Court drew a brighter line between Rule 23 class actions and Fair Labor Standards Act (FLSA) Section 216(b) collective actions,[3] it left corporate employers, employees, and attorneys with questions about the sustainability of certain strategies in litigating collective actions.[4] The viability of such strategies will be more evident if the Court directly settles the underlying *Symczyk* issue in a future case.

This Note examines the essential issue: whether an unaccepted offer of judgment moots an individual plaintiff's FLSA Section 216(b) claim.[5] Specifically, Part II introduces the FLSA and Section 216(b)'s collective actions mechanism, Federal Rules of Civil Procedure Rule 23 and Rule 68, and courts' evolving jurisprudence regarding Rule 68 mootness in class and collective actions. Part III utilizes Justice Kagan's *Symczyk* hypothetical to analyze the divergent analysis federal courts have used in evaluating the effect of offers of judgment on plaintiffs' class and collective action claims.[6] Finally, Part IV recommends the Court explicitly declare a plaintiff's claim to be alive and well in the face of an unaccepted offer based on the similar purpose and structure of Rule 23 and Section 216(b).

II. BACKGROUND

Under Section 216(b) of the FLSA, Congress gave employees the opportunity to collectively litigate against an employer, by bringing a collective action, for violations affecting similarly situated employees.[7] This Part focuses primarily on the historical and evolving jurisprudence surrounding this section of the FLSA. Recently, the Supreme Court acknowledged lower courts' divergent treatment of the intersection of Section 216(b) collective actions, class actions under Rule 23 of the Federal Rules of Civil Procedure (FRCP), and the potential mooting effect of unaccepted FRCP Rule 68 offers of judgment.[8] To lay the foundation for the rest of the Note, the following sections will provide an overview of the FLSA and Section 216(b), FRCP Rule 23, FRCP Rule 68, and courts' handling of Rule 68 mootness principles in Section 216(b) collective actions.

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1. Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1529 (2013).

2. *Id.* at 1536–37 (Kagan, J., dissenting).

3. *Id.* at 1529 (noting that plaintiff Symczyk erroneously relied on the relation-back doctrine of Rule 23 jurisprudence and holding the doctrine does not apply in collective action cases).

4. *See* Seyfarth Shaw LLP, *Genesis of a Clearer Distinction Between Class and Collective Actions? Supreme Court Decides Symczyk* (Apr. 16, 2013), http://www.wagehourlitigation.com/rule-23-class-certification/genesis-of-a-clearer-distinction-between-class-and-collective-actions-supreme-court-decides-symczyc/ ("[T]he viability of the specific strategy utilized by Genesis remains in the hands of the circuit courts[.]").

5. 29 U.S.C. § 216(b) (2012).

6. Because the *Symczyk* majority declined to address this issue, its rationale and holding in this case—although potentially useful as a predictive tool—is not essential to this Note. Therefore, this Note focuses predominantly on the dissenting opinion and its emphasis on the importance of the issue of this Note.

7. 29 U.S.C. § 216(b).

8. *Symczyk*, 133 S. Ct. at 1523 (2013).

A. Fair Labor Standards Act

In 1938, Congress enacted the FLSA to support "the unprotected, unorganized, and lowest paid of the nation's working population."[9] Codified at 29 U.S.C. § 201 *et seq.*, the FLSA carries out this purpose through provisions: 1) establishing a minimum wage;[10] 2) setting a threshold of 40 hours per week, beyond which an employer must pay the employee one and a half times the regular hourly rate;[11] 3) requiring employers to keep track of all employees' wages and hours;[12] and 4) authorizing individual employees and the Secretary of the Department of Labor to bring lawsuits against employers in federal court.[13] To understand how lawsuits alleging FLSA violations have developed in court, it is first important to outline the evolution of the legislation as well as how the section authorizing collective actions fits into the legislative purpose and framework of the FLSA.

1. Section 216(b) and the Authorization of Collective Actions

When Congress enacted the FLSA, it gave extensive powers to employees by allowing designated representatives to bring actions on behalf of all similarly situated employees.[14] As a result, the courts saw a swell of frivolous lawsuits by plaintiffs who had no interest in the outcome.[15] By 1947, Congress had taken steps to reduce the swell, including eliminating the designated representative option, and adding the requirement that an employee give written consent, i.e. opt-in, to become a party in the lawsuit.[16] In proposing the amendment, Senator Donnell—chair of the Senate Judiciary Committee—explained the rationale for the change:

> '[I]t is certainly unwholesome to allow an individual to come into court alleging that he is suing on behalf of 10,000 persons and actually not have a solitary person behind him, and then later on have 10,000 men join in the suit, which was . . . not brought with the actual consent . . . of the individuals for whom . . . plaintiff filed the suit.'[17]

Nevertheless, Congress left intact the ability to bring a collective action, and courts continued to enforce the "broad remedial goal of the statute."[18] Courts have found that the collective action mechanism works to the advantage of both employees and employers.[19] Plaintiffs have their cases heard at the same time while defendants avoid the costs of defending multiple lawsuits.[20] The current Section 216(b) authorizes any employee to bring an action against an employer "for and in behalf of himself . . . and other employees

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9. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 n.18 (1945).
10. 29 U.S.C. § 206 (2012).
11. *Id.* § 207(a)(1).
12. *Id.* § 211(c).
13. *Id.* § 216(b).
14. Martino v. Mich. Cleaning Co., 327 U.S. 173, 175 n.1 (1946).
15. *See* Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 173 (1989) (citing congressional records indicating FLSA amendments were proposed in response to excessive litigation).
16. *Id.*
17. 93 CONG. REC. 2182 (1947).
18. *Hoffmann-La Roche, Inc.*, 493 U.S. at 173.
19. Culver v. Bell & Loffland, Inc., 146 F.2d 29, 31 (9th Cir. 1944).
20. *Id.*

similarly situated."[21]

2. Differences in Certification Between Section 216(b) Collective Actions and Rule 23 Class Actions

To understand the issue in the circuit split, it is helpful to see how collective actions, under Section 216(b) of the FLSA, compare to class actions, under FRCP Rule 23. Similar to collective actions, the Supreme Court has found Rule 23 class actions are in place to benefit both plaintiffs and defendants.[22] Indeed, judicial efficiency, affording plaintiffs opportunities to minimize costs, and encouraging private attorneys to bring these actions were likely central to both Section 216(b) and Rule 23.[23] Although the mechanisms share similar policy goals, they became fundamentally distinct in 1966 when the Supreme Court's Advisory Committee drafted the amendment to Rule 23 that would make its class certification process different from the process under Section 216(b).[24] Moving forward, this functional difference will likely influence a court's analysis of the mootness question.[25]

Importantly, a Rule 23 class action establishes a definition for a class under which each person fitting the definition becomes a class member.[26] This binds class members to the judgment in the case, regardless of the judgment's favorability.[27] Finally, it is crucial to the analysis of this issue that certification under Rule 23 creates a class with a legal status independent of its named plaintiffs.[28] Unlike Rule 23's automatic class creation mechanism, Section 216(b) requires a person's affirmative, written consent in order to become a plaintiff and be bound by the judgment in the case.[29] In addition to creating particular policy concerns,[30] this opt-in requirement affects the collective legal status during the certification stage.[31] In fact, the Supreme Court held that conditional certification only triggers the notification of other potential plaintiffs, but it does not change the collective legal status.[32] These questions of a class or collective's independent legal status impact the ultimate question of mootness as it relates to singular offers of judgment

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21. 29 U.S.C. § 216(b).

22. *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) (holding the class action mechanism is necessary because it provides aggrieved persons effective redress where individual, small suits may be impractical); U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 402–03 (1980) (arguing Rule 23 lowers litigation costs and prevents application of inconsistent obligations for defendants).

23. Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 VAND. L. REV. 727, 734 (2010).

24. *Id.* Ruan also acknowledged a theory that the different construction of the provisions had more to do with Congress's reluctance to amend Section 216(b) than with anything fundamentally different about FLSA collective actions and Rule 23 class actions. *Id.* (citing James M. Fraser, Note, *Opt-in Class Actions Under the FLSA, EPA, and ADEA: What Does it Mean to be "Similarly Situated"?*, 38 SUFFOLK U. L. REV. 95, 104 (2004)).

25. *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1525 (2013) (noting that "Rule 23 provisions are fundamentally different from FLSA collective actions").

26. LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 288 (5th Cir. 1975).

27. *Id.*

28. *Symczyk*, 133 S. Ct. at 1530.

29. 29 U.S.C. § 216(b).

30. *See* Ruan, *supra* note 23, at 734 (arguing the opt-in requirement increases the likelihood that potential plaintiffs will not participate).

31. *See Symczyk*, 133 S. Ct. at 1530 (holding that FLSA "conditional certification" does not create a collective with a legal status independent of the named plaintiff).

32. *Id.*

to named plaintiffs.[33]

B. Rule 68 of the Federal Rules of Civil Procedure

FRCP Rule 68 is designed to provide for settlement of cases prior to trial.[34] The relevant sections of Rule 68 state:

> (a) Making an Offer; Judgment on an Accepted Offer. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment. (b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.[35]

The purpose of Rule 68 is to hasten litigation and foster collaborative settlements.[36] To that end, when a plaintiff receives an offer of complete relief under Rule 68, her claim may be moot because she would no longer have a personal stake in the outcome of the litigation, which would result in the absence of a justiciable case or controversy.[37]

With that foundational knowledge of Rule 68 in mind, it is easy to see how employers can use an offer of judgment to defend against potential Section 216(b) collective actions. The strategy, known as "Picking off" plaintiffs, involves presenting a Rule 68 offer of judgment to the named plaintiff.[38] According to mootness principles, this offer of judgment would render the plaintiff's claim moot so long as the claim would be wholly satisfied by the offer.[39] By rendering the named plaintiff's claim moot, a defendant can prevent the certification of a collective and mitigate the exposure associated with numerous plaintiffs and significant damages claims.[40] In its most rigid form, this would essentially allow employer-defendants to dictate when—if ever—they would defend against a class or collective.[41] Therefore, the primary question related to Rule 68—one that would likely be

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33. *Id.* Other legal commentators have highlighted the importance of the independent legal status in suggesting collective action defense strategies for management-side attorneys. *See* Stuart Gerson, *Supreme Court Applies Strict Analysis in Bouncing FLSA Collective Action, Even After "Conditional Certification."*, EPSTEIN BECKER & GREEN, P.C. (Apr. 17, 2013), http://www.wagehourblog.com/2013/04/articles/collective-actions/supreme-court-applies-strict-analysis-in-bouncing-flsa-collective-action-even-after-conditional-certification/ (noting the Court's emphasis on independent legal status of class and collective actions can serve as a major indicator for future collective action litigation).

34. J. Evan Gibbs, *Mooting the Mootness Issue as Moot?:* Symczyk*'s Impact on FLSA Litigation in Florida and Beyond*, 87 FLA. BAR J. 38, para. 12 (2013).

35. FED. R. CIV. P. 68.

36. *See* Gibbs, *supra* note 34, at 40 (citing Marek v. Chesny, 471 U.S. 1 (1985)).

37. *Id.*

38. M. Andrew Campanelli, Note, *You Can Pick Your Friends, but You Cannot Pick Off the Named Plaintiff of a Class Action: Mootness and Offers of Judgment Before Class Certification*, 4 DREXEL L. REV. 523, 525 (2012).

39. *Id.*

40. *Id.* at 526.

41. Defendants would not have the same power to control the makeup of the parties where a court has already certified a Rule 23 class. *See infra* Part II.C.1 (introducing *Sosna v. Iowa*, in which the Court held that certified classes take on a legal status independent of the named plaintiffs).

dispositive in addressing this Note's issue—is whether a named plaintiff who declines a Rule 68 offer of judgment has a right to represent other potential plaintiffs in a Section 216(b) collective action.[42]

C. Cases Interpreting Unaccepted Offers of Judgment

The circuits have resolved the issue of whether an unaccepted offer of judgment moots an individual FLSA claim in different ways.[43] The Second Circuit held that so long as there are not any conditions on an offer that a plaintiff need not accept, an unaccepted offer of judgment would moot an individual plaintiff's claim.[44] Conversely, in *Weiss v. Regal Collections*, the Third Circuit indirectly addressed the issue when it held that an unaccepted offer of judgment mooted a putative class representative's claim under Rule 23.[45] However, the court utilized the "relation back" doctrine and remanded the case to allow the plaintiff to file a motion for certification.[46] This effectively allowed the plaintiff an opportunity to file a motion for class certification and make his claim indivisible from the rest of the class.[47] The development and use of the relation-back doctrine has allowed many courts to ignore this Note's main issue.[48] Through cursory overviews of two cases, the next sections will highlight the relation-back doctrine's evolution in class actions as well as its demise with regard to collective actions.

1. Sosna *Introduces the Relation-Back Doctrine*

The Supreme Court introduced the relation-back doctrine in *Sosna v. Iowa*, its first significant class action mootness case.[49] *Sosna* involved a woman filing a class action to challenge the constitutionality of a state statute that required any person petitioning for divorce to have been a resident of the state for at least one year prior to the filing.[50] Before the case reached the Court, Sosna had both satisfied the one-year requirement and was able to obtain a divorce in another state.[51] The Court emphasized that her claim would be moot for lack of a live controversy if she had only filed on behalf of herself.[52] However, the Court focused on the binding nature of Rule 23 class actions and how, once certified, a

42. *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1537 (2013) (Kagan, J., dissenting) (emphasizing that Court could have resolved the circuit split and case by focusing on the question).

43. *See, e.g.*, Weiss v. Regal Collections, 385 F.3d 337 (3rd Cir. 2004) (holding that under traditional mootness principles a class action may be dismissed when an offer of judgment precedes a motion for class certification); McCauley v. Trans Union, L.L.C., 402 F.3d 340 (2d Cir. 2005) (holding that a rejected offer of judgment will not moot an individual plaintiff's claim by itself).

44. *McCauley*, 402 F.3d at 342.

45. *Weiss*, 385 F.3d at 342.

46. *Id.* at 348.

47. *See id.* ("[W]here a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint.").

48. *See* Seyfarth Shaw LLP, *supra* note 4 (noting that the Court was able to ignore "whether an unaccepted offer of judgment truly makes a claim moot" because the lower court had utilized the relation-back doctrine to rule for plaintiff).

49. Campanelli, *supra* note 38, at 529 (citing Sosna v. Iowa, 419 U.S. 393 (1975)).

50. Sosna v. Iowa, 419 U.S. 393, 393 (1975).

51. *Id.* at 399.

52. *Id.*

class takes on an independent legal status.[53] Importantly, the Court also noted that even when a class is not yet certified, the particular facts of the case should be looked at to determine "whether the certification can be said to 'relate back' to the filing of the complaint."[54] In such a case, the named plaintiff's claim may be moot, but a live controversy can still exist between the defendant and a member of the class.[55] As a result of this principle, *Sosna* and the relation-back doctrine became the chosen method for preserving class action cases where the named plaintiff's individual claim was moot.[56] This tactic spread to collective actions and was used until the Court's decision in *Symczyk*.

2. Symczyk *Draws Line Between Class and Collective Actions*

In 2013, the Supreme Court drew a hard line between Rule 23 class and FLSA collective actions.[57] The case involved a registered nurse, Symczyk, who brought suit against her employer—Genesis Healthcare—on behalf of herself and other similarly situated plaintiffs.[58] Symczyk alleged that the employer failed to pay employees for working during meal breaks by automatically deducting 30 minutes for lunch breaks.[59] In response, Genesis submitted a Rule 68 offer of judgment in the amount of $7500 with the condition that it would be deemed withdrawn if Symczyk did not accept it within ten days.[60] Symczyk never accepted the offer, and Genesis moved for dismissal based on her claim being moot.[61] After finding that the offer wholly satisfied Symczyk's claim and that no other parties had opted in to the suit, the District Court held that her claim was moot and dismissed the suit.[62] The Court of Appeals agreed that a Rule 68 offer of judgment would usually moot Symczyk's claim.[63] However, after the court found that the employer was likely trying to "pick off" Symczyk, it remanded the case to the District Court to provide Symczyk an opportunity to seek conditional certification.[64]

The Supreme Court reversed the Third Circuit and explicitly distinguished Rule 23 actions from collective actions under the FLSA.[65] In particular, the majority opinion stressed the differences in legal status between putative classes under Rule 23 and conditionally certified classes under the FLSA.[66] Under the FLSA, conditionally certified classes do not have an independent legal status that would allow a class to continue operating if the named plaintiff's claim was moot.[67] Ultimately, the majority was able to

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53. *Id.*

54. *Id.* at 402, n.11.

55. *Sosna*, 419 U.S. at 402.

56. *See* Campanelli, *supra* note 38, at 548 (noting courts apply the relation-back doctrine where it would otherwise be easy for defendants to pick off named plaintiffs).

57. Seyfarth Shaw LLP, *supra* note 4 (citing Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1529 (2013)).

58. *Symczyk*, 133 S. Ct. at 1527.

59. *Id*.

60. *Id*. Specifically, Genesis offered Symczyk $7500 in unpaid wages, plus attorney's fees, costs and expenses.

61. *Id*.

62. *Id*.

63. *Symczyk*, 133 S. Ct. at 1527.

64. *Id*.

65. *Id*. at 1529 ("Rule 23 actions are fundamentally different than collective actions under the FLSA.").

66. *Id*. at 1530.

67. *Id*.

rule for the employer using this rationale and the assumption that Symczyk's claim was moot.[68]

The majority explicitly declined to decide the issue of "whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot" because neither party raised it.[69] In her dissent, Justice Kagan chided the majority for "resolv[ing] an imaginary question, based on a mistake the courts below made about [*Symczyk*] and others like it."[70] Justice Kagan emphasized that Rule 68 does not permit a court to enter judgment on a settlement against a plaintiff's wishes.[71] In her view, a court should simply view an unaccepted offer of judgment as revoked, even if the defendant requested that the court enter judgment.[72] This point, however, is precisely where the majority seems to disagree with Justice Kagan; although, as noted earlier, the Court never reaches that question.[73] This Note addresses the underlying question that Justice Kagan stresses the Court should have addressed, and which she argues is clear from the language of Rule 68 and the history of Section 216(b) collective actions.

III. ANALYSIS

This Part examines the effects of the divergent analysis of offers of judgment to named plaintiffs in collective and class actions. Part III, Section A provides a hypothetical based on Justice Kagan's dissent in *Symczyk*[74] that can be used as a framework for understanding the issue. Part III, Section B discusses how circuit courts have distinguished class and collective actions. Part III, Section C focuses on how an employer's defense strategy in potential collective actions has created the issue of this Note and introduces a public policy analysis of the issue.

A. The Symczyk *Hypothetical*

In *Symczyk*, Justice Kagan introduced a hypothetical in order to demonstrate how a Section 216(b) FLSA collective action might develop.[75] Although she wrote the hypothetical to illustrate how the majority opinion missed the case's main issue,[76] it can serve as a useful framework for understanding the analytical distinctions between Section 216(b) and Rule 23 actions. Justice Kagan focused on the legal analysis of collective action claims but alluded numerous times to the purpose of FLSA collective actions and the need for courts to acknowledge the full breadth of plaintiffs' interests in such cases.[77] This Note outlines the foundations of the circuit split as well as how that analytical difference affects the underlying purpose of collective actions by referencing the hypothetical throughout the

68. *See Symczyk*, 133 S. Ct. at 1529 (noting that Symczyk accepted the Third Circuit's ruling that her claim was moot).

69. *Id*. at 1528–29.

70. *Id*. at 1532 (Kagan, J., dissenting).

71. *Id*. at 1536 (Kagan, J., dissenting).

72. *Id*. at 1535 (Kagan, J., dissenting).

73. *Symczyk*, 133 S. Ct. at 1536–37 (Kagan, J., dissenting).

74. *Id.* at 1535 (Kagan, J., dissenting).

75. *Id.* (Kagan, J., dissenting)

76. *Id.* (Kagan, J., dissenting) (introducing the hypothetical as an illustration of why the majority opinion addresses a "make-believe problem").

77. *See id.* (Kagan, J., dissenting) (pointing to the difference between plaintiff's simple personal interest in an FLSA claim and her legal interest in representing a potential class of plaintiffs).

next two Parts.

Justice Kagan's dissent introduces a hypothetical plaintiff, Smith, who brought an action under Section 216(b) against her employer on behalf of herself and her coworkers.[78] Throughout the consideration and certification of a collective, Smith's personal claim for damages against her employer would be alive and would survive even a change in employment practices that remedied the FLSA violation.[79] However, if Smith's employer introduced a Rule 68 offer of judgment to the litigation prior to the certification of a collective, the court would need to analyze whether the offer meets all of the plaintiff's requests for which the law provides.[80] This issue becomes most salient the moment Smith's employer supplements the offer with a request to the court that it enter judgment for her—whether or not she accepts the judgment.[81] Part III, Section C examines this strategy—known as "picking off plaintiffs"—through a public policy lens.[82]

B. The Analytical Evolution of Section 216(b) of the Fair Labor Standards Act

Section 216(b) actions have evolved over time, and certain components of current 216(b) claims effectuate FLSA purposes more fully than others.[83] To illustrate, at the outset of Smith's claim, she may bring the action "for and in behalf of [her]self . . . and other employees similarly situated."[84] In evaluating whether the claim can move forward as a collective action, a court will usually apply a two-step analysis.[85] The first step of the process involves the court deciding, based only on the pleadings and affidavits, whether there are other employees similarly situated to Smith.[86] The court may decide to certify the collective conditionally at this point in order to facilitate the process of notifying potential similarly situated employees of the pending action.[87] From a policy perspective, this aligns well with the FLSA's purpose because it enables workers to bring claims where they might otherwise lack the awareness or practical knowledge to join the case.[88] The second step in the analysis requires the court to analyze the facts of an individual plaintiff's circumstances to determine whether she is similarly situated.[89] Such a determination would give legal status to the collective,[90] but similarly situated plaintiffs would need to affirmatively opt-

78. *Symczyk*, 133 S. Ct. at 1535 (Kagan, J., dissenting) (using "Smith" to convey the plaintiff's "typicality" in the hypothetical).

79. *Id.* (Kagan, J., dissenting) (noting that Smith's claim would survive change in employment practices because it is "a damages claim for *past conduct*") (emphasis added).

80. *Id.* at 1536 (citing Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 341 (1980)).

81. *See id.* at 1536 (recognizing Rule 68 purpose of "promot[ing] voluntary cessation of litigation by imposing costs on plaintiffs who spurn certain settlement offers").

82. *See infra* Part III.C (highlighting public policy implications of employer's defense strategy on underlying purpose of Section 216(b)).

83. *See supra* Part II.A.1 (noting Congress's efforts to amend Section 216(b) over time in a way that prevents frivolous lawsuits while still allowing workers to collectively litigate claims).

84. 29 U.S.C. § 216(b).

85. Ruan, *supra* note 23.

86. *Id.*

87. *Id.*

88. *Id.* at 731 (citing Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 173 (1989)).

89. *Id.*

90. *Cf.* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1525 (2013) (holding "conditional[ly] certifi[ed]" collectives have no independent legal status, unlike Rule 23 class actions).

in to have the court analyze their "similarly situated" status.[91] The affirmative opt-in process would likely cause Smith's potential co-plaintiffs some delay in joining the lawsuit,[92] making the conditional status during the preceding step an important framework for analyzing the central issue of this Note.

1. Hoffman-La Roche, Inc. *and* Symczyk *Limit the Legal Status of Conditionally-Certified Collectives*

Unfortunately for Smith, even though the court may conditionally certify the collective, it will obtain no legal status independent from hers.[93] Beginning with *Hoffman-La Roche, Inc.*, the Supreme Court limited the purpose of conditional certification, enabling a trial court to assist a plaintiff like Smith in notifying other similarly situated employees.[94] The limitation did not effectively end independent legal status for a collective, but it curtailed the usefulness of conditional certification overall.[95] Furthermore, it introduced a distinction between the analysis of conditionally certified collectives and Rule 23 class actions focused on the independent legal status of the two claims.[96]

Although *Hoffman-La Roche, Inc.* was not final, *Symczyk* solidified the principle that "FLSA 'conditional certification' does not produce a class with an independent legal status."[97] For Smith, this decision would not necessitate a change of her initial approach to her FLSA claims. Instead, it provides employers with an additional defense litigation strategy depending on the circuit in which the case is brought.[98]

2. Section 216(b) and Rule 23 Take Separate Forks in the Analytical Road

Even though collective and class actions look similar in many ways, Smith's employer has an additional defense strategy available against Smith's collective action because of the way select circuits analyze named plaintiff's standing in the context of offers of judgment.[99] Arguably, this additional strategy stems from a divergent analytical framework that courts have used over time regarding the functionally similar Rule 23 and Section 216(b) actions.[100] Specifically, courts have reasoned separately from the Supreme

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91. 29 U.S.C. § 216(b).

92. *See* Gibbs, *supra* note 34, at 38 (highlighting the process of sending notice to putative plaintiffs in a collective action, as well as the danger of mooting the case before the putative plaintiffs can opt in).

93. *Symczyk*, 133 S. Ct. at 1530 (citing Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 171–73 (1989) for stating the sole purpose of conditional certification as sending "court-approved written notice to employees").

94. Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 170 (1989).

95. *See* Ruan, *supra* note 23, at 749 (explaining how conditional certification allows early judicial intervention to preserve employees' rights).

96. *Symczyk*, 133 S. Ct. at 1525.

97. *Id.*

98. *See* Seyfarth Shaw LLP, *supra* note 4 (explaining this Note's issue is now with the circuits because they will decide under what circumstances a particular Rule 68 offer of judgment will moot an individual plaintiff's claim).

99. *See, e.g.*, Weiss v. Regal Collections, 385 F.3d 337 (3d Cir. 2004) (holding that, under traditional mootness principles, a class action may be dismissed when an offer of judgment precedes a motion for class certification); McCauley v. Trans Union, L.L.C., 402 F.3d 340 (2d Cir. 2005) (holding that a rejected offer of judgment will not moot an individual plaintiff's claim by itself).

100. *See supra* Part II.A.2 (describing the similar purposes, yet distinctive analytical paths that courts have utilized in class and collective action cases). Some commentators argue that the analytical framework is consistent even throughout the majority and dissenting opinions in *Symczyk*. They point to Justice Kagan making a

Court's command that "named plaintiffs are representatives of the class members' interests."[101] In *Deposit Guaranty National Bank v. Roper*, the Court gave three justifications for its decision that shed light on how it could answer a similar question in a collective action case: 1) that it would be "contrary to sound judicial administration," 2) "frustrate the objectives of class actions, and 3) "invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement."[102] Courts have used these reasons to insulate named plaintiffs' claims in certified and uncertified class actions from mootness relating to offers of judgment.[103] Significantly, the Court used the relation-back doctrine, which effectively nullifies Rule 68 offers of judgment in class action cases.[104] Although *Symczyk* rendered the relation-back doctrine useless in collective actions,[105] it is plausible that these same reasons and the underlying purpose of the relation-back doctrine can provide guidance for litigators navigating a collective action through the circuits.

C. An Employer's Defense Strategy: Picking Off Plaintiffs

The central issue in this Note—whether an unaccepted offer of judgment moots an individual FLSA claim—arises when Smith's employer makes a Rule 68 offer of judgment prior to final certification of the collective.[106] At that point, Smith's strategy, as well as the employer's, will be guided by the circuit's precedential cases on mootness relating to offers of judgment and the purpose of collective actions.[107] After *Symczyk*, employers can more effectively use an offer of judgment to avoid the costly effects of litigating a collective action case because courts will no longer be able to bypass the mootness question via the relation-back doctrine.[108]

1. Collective or Class: Rule 68 Highlights Key Differences

In *Symczyk*, the Court emphasized that the plaintiff would not have a "personal interest" in representing others because she did not challenge the lower court's finding of

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distinction between the initial unaccepted offer and mootness question, and then proceeding to answer the question that the majority analyzes. However, it is easier to read Justice Kagan's short response to the majority's question as her assuming arguendo, without deciding, that Symczyk's claim was moot. *See generally* Mike Dorf, *Was Justice Kagan's Snarkiness in* Genesis Healthcare v. Symczyk *Justified?* (July 22, 2013), http://www.dorfonlaw.org/2013/07/was-justice-kagans-snarkiness-in.html (arguing Justice Kagan's dissent was a semantic, but not substantive distinction from the majority's opinion).

101. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 340 (1980).

102. *See* Ruan, *supra* note 23, at 742 (quoting Deposit Guar. Nat'l. Bank v. Roper, 445 U.S. 326, 339 (1980)); *see also* Ruan, *supra* note 23, at 742 n.80 (citing Weiss v. Regal Collections, 385 F.3d 337, 344 (3d Cir. 2004) to support the argument that "picking off plaintiffs" strategy would frustrate the purpose of class actions).

103. *See, e.g.*, *Weiss*, 385 F.3d at 348 (insulating plaintiff's claim from mootness through the use of the relation-back doctrine).

104. *See* Ruan, *supra* note 23, at 744 ("Despite being introduced in a footnote in *Sosna*, the relation-back doctrine has reappeared as the central underpinning for decisions holding that full offers of judgment to plaintiffs do not render class actions moot.").

105. Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1531 (2013).

106. *Id.* at 1535 (Kagan, J., dissenting).

107. *See generally* Ruan, *supra* note 23 (outlining Rule 68 offers of judgment impact on collective and class actions, as well as the purposes of collective actions and offers of judgment).

108. *Symczyk*, 133 S. Ct. at 1531.

mootness regarding her claim.[109] To distinguish the principal case from Smith's lawsuit, it is useful to assume for a moment that Smith challenged the issue of mootness,[110] or that it simply has not been decided yet.[111] At that point, the purpose of FLSA actions—to support "the unprotected, unorganized, and lowest paid of the nation's working population"[112]—aligns with the Court's requirement of the named plaintiff's personal interest in the litigation.[113] At least one author who has written about this issue argues that prohibitions against mootness in the Rule 23 and Rule 68 context arose because Rule 23 requires judicial oversight of the fairness and equity of the proposed settlement.[114] Judicial oversight, whether in Rule 23 or Section 216(b) cases, can arguably serve the same purpose where the named plaintiff has a statutory interest in representing similarly situated potential plaintiffs.[115] Notably, prior to Rule 23 including this judicial oversight, it functioned similarly to Section 216(b).[116] At least one legal scholar has argued that amending Rule 23 without Congress amending Section 216(b) "may have simply been an oversight,"[117] but it is equally plausible that Congress decided over the years to not amend Section 216(b) in a similar way. The underlying purposes of the two statutes contribute helpful analysis regarding this question.

2. How the Underlying Purposes of Rule 23 and Section 216(b) Affect Their Interpretation

In *Symczyk*, the Supreme Court drew a hard line between Rule 23 class and FLSA collective actions.[118] However, even prior to *Symczyk*, allowing a Rule 68 offer of judgment to have such power over the plaintiff's ability to move forward with the case increases her risk tremendously.[119] Such risks will likely frustrate the "broad remedial goal of [Section 216(b)]."[120] However, given the majority's treatment of this rationale in *Symczyk*, it is likely that the statutorily-created interest in representing other similarly situated plaintiffs will not be enough to overcome the presumption of mootness that the Court applies to unaccepted offers of judgment.[121] The Court left the question open in *Symczyk*.[122] The Court will likely address the statutory construction, history of Section 216(b), and equities of collective actions as they relate to mootness, when the issue is

109. *Id.* at 1525.

110. *See id.* at 1529 (assuming, without deciding, that Symczyk's claim was moot because she failed to challenge mootness in her brief to the Court).

111. *See* Seyfarth Shaw LLP, *supra* note 4 (noting the Court was able to bypass mootness question because the plaintiff waived the argument).

112. *See supra* Part II.A (introducing the purpose and Congress's intent behind FLSA).

113. *Symczyk*, 133 S. Ct. at 1529.

114. Ruan, *supra* note 23, at 758.

115. *See id.* at 748 (identifying judicial oversight as a common goal of class and collective actions).

116. *See id.* at 734 (noting that congressional oversight of the FLSA and Supreme Court Advisory Committee's oversight of Rule 23 may have contributed to the amendment of two provisions in different ways).

117. *Id.*

118. Seyfarth Shaw LLP, *supra* note 4 (citing *Symczyk*, 133 S. Ct. at 1529).

119. *See* Ruan, *supra* note 23, at 757 (arguing Rule 68 creates disproportionate risk in collective actions because plaintiff will face financial risk of paying attorney's fees at the end of the case, as well as personal risks in the workplace because of the nature of FLSA actions).

120. *See supra* Part II.A.1 (introducing Congress's intent behind Section 216(b)).

121. Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1530 (2013).

122. *Id.* at 1529.

squarely in front of it in a future case.

IV. RECOMMENDATION

As Justice Kagan expressed in *Symczyk*, the Supreme Court could have answered this Note's main question, whether an unaccepted offer of judgment moots an individual FLSA claim.[123] The Court should decide the question when a case squarely presents the issue again. Such a decision will serve multiple purposes, including: 1) providing clarity among the circuit courts,[124] 2) creating guidance for plaintiffs' attorneys in litigating FLSA collective actions,[125] and 3) putting employers' attorneys on notice about applicable defense litigation strategies.[126] In a future case, the Court will likely address the statutory construction, history of Section 216(b), and equities of collective actions as they relate to mootness in order to answer this question. This Part explains the ways in which the Court may answer this question in a future case using a plaintiff's rationale and an employer's rationale. Based on the functional similarities between Rule 23 class actions and Section 216(b) collective actions, as well as the underlying purpose of collective actions, this Part recommends that courts treat a plaintiff's claim as alive and well in the face of an unaccepted offer of judgment.

A. A Plaintiff's Strategy for Avoiding Mootness

Plaintiffs' attorneys may use three primary strategies to avoid the court dismissing their cases in anticipation of a defendant picking off plaintiffs in a collective action. First, as it relates to damages, a plaintiff can argue that a defendant's Rule 68 offer does not fully meet her claim for damages.[127] Courts have held that such an offer is invalid and, therefore, a plaintiff's claim would survive.[128] Second, plaintiffs may successfully argue that even though a conditionally certified collective has no independent legal status, maintaining collective actions after an unaccepted Rule 68 offer fulfills the judicial economy and restitution purposes of the FLSA.[129] A plaintiff may persuade the court that it can best fulfill Congress's intent to protect a vulnerable working population by eliminating a defendant's opportunity to strategically prevent potential plaintiffs from opting into a collective.[130] As a practical matter, this avoids the arguably absurd result where a plaintiff declines an offer of judgment, the court enters judgment for the plaintiff anyway, and the plaintiff ultimately collects nothing from the defendant because of the unaccepted offer.[131]

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123. *Id.* at 1534–35 (Kagan, J., dissenting).

124. *Id.* at 1528–29 (discussing the circuit court holding in this case, and the effect that would be had by "accepting respondent's argument").

125. *See id.* at 1531 (noting that error in plaintiff's argument stemmed from conflation of Rule 23 class action and Section 216(b) collective action precedent).

126. *Symczyk*, 133 S. Ct. 1523, 1533 (Kagan, J., dissenting).

127. *See* Gibbs, *supra* note 34, at 43 (arguing that post-*Symczyk* collective action cases will likely turn on whether a Rule 68 offer meets a plaintiff's exact damages).

128. *Id.*

129. *See id.* at 39 (arguing that both class and collective actions are designed to encourage private attorneys to bring claims on behalf of plaintiffs who individually would have prohibitively small claims).

130. *See supra* Part II.A (introducing congressional intent behind Section 216(b) collective actions as well as the FLSA's overall purpose).

131. *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1535 (2013) (Kagan, J., dissenting) (arguing that the majority's opinion effectively sanctions this possible scenario).

Third, a plaintiff likely needs to include an argument that her personal stake in a claim is exactly the same whether before or after an unaccepted Rule 68 offer.[132] This intersectional-mootness Rule 68 analysis will likely be the crux of the Court's analysis if it reaches this issue in a future case because of the divergent viewpoints of the Courts of Appeals.[133] The Third Circuit specifically articulated that a plaintiff in a class or collective context has an interest in representing other potential plaintiffs for two reasons.[134] Initially, the court found the plaintiff had an interest because the statute specifically sets standards for aggregating small claims.[135] Then the court recognized a plaintiff's practical interest in decreasing litigation costs through spreading such cost across all plaintiffs.[136] Each of the preceding three points provides persuasive reasons for interpreting an unaccepted Rule 68 offer as invalid in the context of mootness.

B. Path Dependency and the Court's Precedent

Armed with the majority's *Symczyk* opinion, employers have two strong strategies available for defending potential FLSA collective actions, as well as an apparent willingness by at least some members of the Court to rule that an unaccepted offer of judgment moots an individual plaintiff's claim.[137] First, employers can use a two-step strategy to argue: 1) a Rule 68 offer that fully meets a plaintiff's claim will generally moot the claim because the plaintiff will no longer have a personal interest in the outcome,[138] and 2) collectives have no independent legal status.[139] Therefore, a named plaintiff has no vested legal interest in a court resolving the claims of similarly situated individuals at least until the court certifies the collective.[140] Second, a line of cases, including *Sosna*, *Hoffman-La Roche, Inc.*, and *Symczyk*, indicates that the Court's path dependence has led to courts treating Rule 23 class actions and Section 216(b) collective actions differently under the law.[141] This line of reasoning should be persuasive to lower courts, and it indicates that the majority of justices in *Symczyk* are likely to follow precedent if the issue is squarely in front of them again. Between the two preceding tactics, employers have strong options for litigation strategies, and the Court has firm ground to hold that an unaccepted offer moots an individual plaintiff's claim.

C. The Court Should Realign Class and Collective Actions

This Note recommends that the Court hold that an unaccepted Rule 68 offer of judgment does not moot an individual plaintiff's claim even prior to certification of a

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132. *See id.* at 1533 (Kagan, J., dissenting) (noting the Court's prior holdings that plaintiff's interest in a suit remains the same even after declining an offer of judgment that would fully satisfy her claims).

133. *Compare, e.g.*, McCauley v. Trans Union, L.L.C., 402 F.3d 340, 342 (2d Cir. 2005), *with* Weiss v. Regal Collections, 385 F.3d 337, 340 (3d Cir. 2004).

134. *Weiss*, 385 F.3d at 344–45.

135. *Id.* at 344.

136. *Id.* at 345.

137. Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1529 (2013).

138. *See id.* (deferring to the circuit court's finding and the plaintiff's concession of mootness in the lower court).

139. *Id.* at 1530.

140. *Id.*

141. *See id.* (highlighting the development of class actions and mootness through *Sosna*, collectives' legal statuses in *Hoffman-La Roche, Inc.*, and the resulting distinction between the two).

Section 216(b) collective. Such a holding will provide clarity and direction to litigators, employees, and employers while also fulfilling the underlying common purposes of Rule 23 class actions and Section 216(b) collective actions.[142] Significantly, it will avoid frustrating Congress's intent to allow FLSA collective actions in the first place.[143] This new standard would prevent Justice Kagan's counterintuitive hypothetical from happening—a scenario in which a court may enter judgment in favor of a plaintiff, yet against her wishes, and still not provide monetary damages.[144] Ultimately, that scenario—like Justice Kagan's characterization of the *Symczyk* decision—would "aid[] no [employee], now or ever."[145]

V. CONCLUSION

For corporate employers, FLSA collective actions are costly, time-consuming, and increasingly frequent sources of dispute with current and former employees.[146] Until April 2013, courts had continually adjudicated Rule 23 class actions and FLSA collective actions in a way that left defendant-employers and plaintiff-employees with uncertainty about the best ways to litigate these structurally similar claims.[147] In *Symczyk*, the Supreme Court missed an opportunity to provide clear guidance about the potential mooting effect of an unaccepted offer of judgment on an individual plaintiff's collective action claim.[148] When it next has the opportunity, the Court should hold that an unaccepted Rule 68 offer of judgment does not moot an individual plaintiff's claim, even prior to certification of a Section 216(b) collective. Such a holding will clearly signal to corporate employers how to best defend against collective actions while fully effectuating the congressional purpose and intent behind the FLSA.[149]

142. *See supra* Part II.A.2 (examining the common historical purposes and development of the two types of actions).

143. *See Symczyk*, 133 S. Ct. at 1536 (Kagan, J., dissenting) (noting Section 216(b) opt-in requirement does not diminish Congress's clear intent to enable similarly-situated plaintiffs to proceed together with an FLSA claim).

144. *Id.* at 1535 (Kagan, J., dissenting) ("That course would be less preposterous than what the court did here; at least Smith, unlike Symczyk, would get some money. But it would be impermissible as well.").

145. *Id.* at 1537 (Kagan, J., dissenting).

146. Amy Traub et al., *Supreme Court Will Decide Whether an Employer Can Moot an FLSA Collective Action With an Offer of Judgment to the Plaintiff*, EPSTEIN BECKER & GREEN, P.C. (July 3, 2012), http://www.wagehourblog.com/2012/07/articles/flsa-coverage/supreme-court-will-decide-whether-an-employer-can-moot-an-flsa-collective-action-with-an-offer-of-judgment-to-the-plaintiff/.

147. *See supra* Part II.A.2 (highlighting the court's evolving jurisprudence in class and collective actions).

148. *Symczyk*, 133 S. Ct. at 1537 (Kagan, J., dissenting).

149. *See supra* Part II.A.2 (examining the historical purposes and development of collective actions).