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Make Him an Offer He Can't Refuse: The Concerning Practice That Effectively Ends Collective Litigation and How to Fix It (Without the Supreme Court)

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MAKE HIM AN OFFER HE CAN'T REFUSE: THE CONCERNING PRACTICE THAT EFFECTIVELY ENDS COLLECTIVE LITIGATION AND HOW TO FIX IT (WITHOUT THE SUPREME COURT)

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Abstract: In certain American jurisdictions, collective action lawsuits are severely limited through rules that enable a defendant to make a settlement offer worth the entirety of the plaintiff's damages and thus moot his or her claim, regardless of whether the offer is accepted. In collective litigation, if the settlement offer is made prior to a motion for class certification, the defendant may end the litigation with minimal costs for the defendant, but with minimal justice for the represented class. This practice of mooting collective actions prior to a motion for class certification leaves the class without a representative, case, or settlement money, effectively ending collective litigation as an avenue of justice. Eliminating collective litigation takes an essential tool out of the hands of individuals seeking to enforce their rights against powerful and unified defendants in areas such as civil rights, environmental justice, and employment law. This Note advocates for either the U.S. Supreme Court to remedy this issue through its jurisprudence or for an amendment to the Federal Rules of Civil Procedure to prevent courts from mooting collective cases with unaccepted settlement offers prior to class certification, either through the traditional rulemaking process or through legislative action.

INTRODUCTION

Laura Symczyk worked as a nurse at the Pennypack Center ("Pennypack"), a medical and rehabilitative facility in Philadelphia, Pennsylvania.[1] Pennypack automatically deducted one half hour's worth of pay daily from Symczyk's paycheck so that her meal break was unpaid, as statutorily permitted.[2] Pennypack, however, often made Symczyk work during her meal

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[1] Symczyk v. Genesis Healthcare Corp. (*Genesis I*), No. 09-5782, 2010 WL 2038676, at *1 (E.D. Pa. May 19, 2010); *Pennypack Center*, GENESIS HEALTHCARE, http://www.genesishcc.com/Pennypack [perma.cc/7T2C-NDR7].

[2] Genesis Healthcare Corp. v. Symczyk (*Genesis III*), 133 S. Ct. 1523, 1527 (2013); *see* Fair Labor Standards Act, 29 U.S.C. § 216 (2012); KENNETH G. DAU-SCHMIDT ET AL., LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE 393 (4th ed. 2011).

breaks, meaning she should have received compensation for this time, as is required under the Fair Labor Standards Act (FLSA).[3] Despite the fact that her employer did not contest that this practice of withholding pay violated her rights, the nature of litigation makes a legal remedy difficult and costly for Symczyk to pursue alone.[4]

Symczyk was not the only one who had been wronged: Pennypack and its corporate relatives, Genesis Healthcare Corporation and Genesis Eldercare (collectively "Genesis"), used the same unlawful system to automatically deduct pay for working meal times from thousands of its employees.[5] In this situation, each wronged employee could have the same claim against his or her employer for the same unlawful practice.[6] Fortunately for these workers, similarly situated parties may litigate a claim collectively as a class rather than individually, avoiding what would ordinarily be a cost-prohibitive attempt at litigation for each individual employee.[7] A collective

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[3] *See* 29 U.S.C. § 216; *Genesis III*, 133 S. Ct. at 1527. The FLSA was passed to ensure a minimum standard that employers must pay employees "to provide for the basic costs of existence in an industrial society." DAU-SCHMIDT ET AL., *supra* note 2, at 327; *see* 29 U.S.C. § 216. An often-litigated aspect of the law is determining if time, such as meal breaks, at work is compensable under the statute. *See* DAU-SCHMIDT ET AL., *supra* note 2, at 383–402; *see, e.g.*, IBP v. Alvarez, 546 U.S. 21 (2005); Pabst v. Oklahoma Gas & Elec. Co., 228 F.3d 1128 (10th Cir. 2000). The Wage and Hour Division's (WHD) enforcement policies allow meal periods to be unpaid if the break lasts at least thirty minutes and the employee is free from "all work duties." *See* DAU-SCHMIDT ET AL., *supra* note 2, at 393.

[4] *See Genesis I*, 2010 WL 2038676, at *1; DAU-SCHMIDT ET AL., *supra* note 2, at 393, 418–19. Although an employee's rights under the FLSA can be enforced by the U.S. Secretary of Labor after an investigation by the WHD, an employee has the right to sue the violating employer for the wage violation. DAU-SCHMIDT ET AL., *supra* note 2, at 418–20. Employees have been doing so more frequently, primarily due to the recent reduction in WHD investigators as the result of budgetary issues. *Id.* Reasonable attorney fees and costs may be included in an action to recover back wages but, considering the modest amount of back pay that Symczyk allegedly was owed, these attorney fees likely would have been insignificant. *See* 29 U.S.C. § 216(b) (2012); *Genesis I*, 2010 WL 2038676, at *1 (stating that Symczyk could have recovered $7500 in damages plus attorneys fees, but that the settlement offer was made the same day that the employer filed an answer to the complaint); DAU-SCHMIDT ET AL., *supra* note 2, at 419.

[5] *See* Complaint at 2–3, Symczyk v. Genesis Healthcare Corp. (*Genesis I*), No. 09-5782, 2010 WL 2038676, at *1 (E.D. Pa. May 19, 2010). Employees may bring FLSA suits individually or by groups of similarly situated workers. *See* 29 U.S.C. § 216(b); DAU-SCHMIDT ET AL., *supra* note 2, at 419.

[6] *See* 29 U.S.C. § 216(b); *Genesis III*, 133 S. Ct. at 1527; Complaint, *supra* note 5, at 2–3.

[7] *See* 29 U.S.C. § 216(b). The process for collective action under the FLSA is different from the process for a class action under Federal Rule of Civil Procedure 23, but both allow for similarly situated individuals to sue collectively. *Compare* 29 U.S.C. § 216(b) (always requiring all plaintiffs to opt in and consent in writing to be a party), *with* FED. R. CIV. P. 23(c) (discussing various ways the court must give notice to absent class members but not always with written consent and allowing absent members to opt out).

lawsuit makes justice more accessible for these employees and is more efficient for the court.[8]

Symczyk filed a complaint on behalf of herself and all other FLSA-covered employees whom Genesis subjected to the illegal automatic pay deductions.[9] Simultaneous with its answer to the complaint, Genesis offered a settlement to only Symczyk, which would compensate her for her previously unpaid lunch breaks and any litigation costs she incurred.[10] This offer would do nothing for the claims of the other wronged employees.[11] Two weeks later, and without a response from Symczyk, Genesis withdrew its offer and moved to have the case dismissed for a lack of subject matter jurisdiction.[12] Genesis argued that, because its offer would have provided Symczyk the complete relief sought in her suit, she now lacked a personal stake in the outcome, which rendered the action moot.[13] Symczyk objected to Genesis's motion, arguing that it was an attempt to "pick off" the named plaintiff before any class action began.[14] However, since no other class members had been able to join Symczyk as a plaintiff yet, the U.S. District Court for the District of Eastern Pennsylvania rejected Symczyk's objection, finding that Genesis's offer fully satisfied her individual claim.[15] Consequently, the District Court concluded that the settlement offer mooted Symczyk's claim.[16]

With the claim mooted, the court dismissed the case for lack of subject matter jurisdiction.[17] After the U.S. Court of Appeals for the Third Circuit reversed the dismissal, the U.S. Supreme Court granted certiorari.[18] U.S. Supreme Court Justice Thomas's majority opinion assumed that the mooting of Symczyk's case was proper and held that, because she had no personal interest in representing the remaining class members, the case was properly dismissed.[19] The Court accordingly reversed the Third Circuit rul-

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[8] *See Genesis III*, 133 S. Ct. at 1527; WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS §§ 1:7–:10 (5th ed. 2014).

[9] *See Genesis I*, 2010 WL 2038676, at *1.

[10] *See Genesis III*, 133 S. Ct. at 1527; *Genesis I*, 2010 WL 2038676, at *1.

[11] *See Genesis III*, 133 S. Ct. at 1527; *Genesis I*, 2010 WL 2038676, at *1.

[12] *See Genesis III*, 133 S. Ct. at 1527.

[13] *See id.*

[14] *Id.*

[15] *Id.* No other class members had joined because Genesis simultaneously answered the complaint and extended its offer. *See id.* Both events occurred before any conditional class certification. Symczyk v. Genesis Healthcare Corp. (*Genesis II*), 656 F.3d 189, 197 (3d Cir. 2011), *rev'd* 133 S. Ct. 1523 (2013).

[16] *Genesis III*, 133 S. Ct. at 1527; *Genesis I*, 2010 WL 2038676, at *4.

[17] *Genesis III*, 133 S. Ct. at 1527.

[18] *Id.* at 1526–27.

[19] *See id.* at 1529, 1532.

ing, thereby affirming the District Court ruling, and leaving Symczyk and the rest of the class without a case or settlement.[20]

A defendant's ability to moot representative plaintiffs' cases with an unaccepted settlement offer before a class certification motion essentially erases the ability to litigate claims collectively.[21] Doing so incapacitates social justice movements led by civil rights groups and environmentalists, for instance, as well as groups of individuals seeking justice against large, well-financed opponents.[22] Part I of this Note discusses collective litigation and its history, procedure, and policy, and the critical role it has played in achieving social justice. Part II examines the current split amongst the U.S. Circuit Courts of Appeal. In addition, Part II analyzes the reasoning in favor of the majority rule of mooting proposed representative's claims and the critical logical, policy, and social justice issues that arise. Part III recommends multiple paths that rely on different branches of government to resolve this problem. Part III also considers both the Supreme Court's ability and eagerness to remedy this issue through litigation as well as possible avenues to amending the Federal Rules of Civil Procedure using both the traditional rulemaking process and legislative action.

I. COLLECTIVE LITIGATION AS A TOOL FOR SOCIAL JUSTICE: HISTORY, PROCEDURE & POLICY

Collective litigation has long played an important role in America's legal system, history, and society.[23] When the Federal Rules of Civil Procedure (the "Federal Rules") were drafted, collective litigation procedures sought to advance several goals to benefit harmed plaintiffs who were unable to bring individual claims: efficiency, compensation, deterrence, and legitimacy.[24] Collective litigation has evolved into its current form primarily as a result of the changing legal atmosphere since the time the Federal Rules were written and the consequential shift in policy goals that the Federal Rules have sought to accomplish.[25]

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[20] *See id.* at 1532.

[21] *See* Weiss v. Regal Collection, 385 F.3d 337, 344 (3d Cir. 2004) ("Allowing the defendants here to 'pick off' a representative plaintiff with an offer of judgment less than two months after the complaint is filed may undercut the viability of the class action procedure . . . .").

[22] *See* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 242–44 (1987).

[23] *See* RUBENSTEIN, *supra* note 8, §§ 1:11–:16; YEAZELL, *supra* note 22, at 267.

[24] *See* Rules Advisory Committee's Note to Amended Rule 23, 39 F.R.D. 69, 102–03 (1966); RUBENSTEIN, *supra* note 8, §§ 1:7–:10, 1:15.

[25] *See* RUBENSTEIN, *supra* note 8, §§ 1:7–10, 1:15 (stating that the change to Federal Rule of Civil Procedure 23 in 1966 "aimed to fulfill important policy objectives, including the channeling of common issues into a single lawsuit to 'achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated without sacrificing procedural

A. The History Behind Federal Rule of Civil Procedure 23

Collective litigation has a deep history in English common law dating back hundreds of years.[26] Similar to the system in England, the American class action practice developed from the compulsory joinder rule in courts of equity.[27] An attempt to institutionalize class actions in the 1938 version of the Federal Rule of Civil Procedure ("FRCP") 23, however, proved difficult for courts to enforce.[28] The rewriting of FRCP 23 in 1966 made class actions more practical for modern courts to apply in a manner that achieved the policy goals behind collective litigation.[29]

The revision of FRCP 23 in 1966 reflects the critical social and political atmosphere at the time.[30] In fact, the drafters of the 1966 amendment considered various social movements when designing the rule.[31] The most significant social justice force in class action evolution during this time was the civil rights movement.[32] After politics failed to provide justice in the face of racial discrimination, civil rights leaders often turned to judicial remedies.[33] The courts attracted opponents of racial discrimination because this discrimination directly opposed the individualism that the legal system claimed to protect.[34] This strategy produced several legally significant vic-

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fairness or bringing about other undesirable results'") (quoting Rules Advisory Committee's Note to Amended Rule 23, 39 F.R.D. 69, 102−03 (1966)).

[26] *See* YEAZELL, *supra* note 22, at 38 (discussing centuries of British collective actions including a rector who sued parishioners in 1199 and collected a few individuals to testify on behalf of the whole group).

[27] RUBENSTEIN, *supra* note 8, § 1:13 (citing THOMAS A. DICKERSON, CLASS ACTIONS: THE LAW OF 50 STATES § 1.02[2]). In the old British courts of equity, this compulsory joinder rule required that "all persons materially interested, either legally or beneficially, in the subject matter of a suit, are to be made parties to it, either as plaintiffs or defendants, however numerous, so that there may be a complete decree which shall bind all." DICKERSON, *supra*, § 1.02[1]. The rule for compulsory joinder has evolved but still remains in the American judicial system. *See* FED. R. CIV. P. 19; RUBENSTEIN, *supra* note 8, § 1:13.

[28] RUBENSTEIN, *supra* note 8, § 1:14. The rule included terms such as "joint" and "common" that were "obscure and uncertain" for courts trying to enforce this rule. *Id.*

[29] *Id.* § 1:15. The Advisory Committee stated that the new rule:

> [D]escribes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.

Id. (quoting Rules Advisory Committee's Note to Amended Rule 23, 39 F.R.D. 69, 99 (1966)).

[30] YEAZELL, *supra* note 22, at 243, 245.

[31] *See id.* at 245 (discussing how the structure of FRCP 23 "makes more sense if what the drafters had in mind were racial minorities on the one hand and diffusely organized interest groups on the other").

[32] *See id.* at 240.

[33] *See id.* at 241.

[34] *Id.*

tories, such as *Brown v. Board of Education*.[35] But these victories fell short in their desired societal impact as national political candidates often did not prioritize civil rights.[36] During the post-*Brown* period, courts showed impatience with integration's slow pace as desegregation suits poured into federal court.[37]

Additionally, the 1960s and 1970s saw other movements bidding for national attention.[38] Many perceived the economy as operating with a short-term perspective that sacrificed long-term values, such as environmental preservation.[39] Specifically, several environmentalists sought to utilize judicial tools—such as nuisance law—to protect resources like air and water; others advocated for preserving part of the vanishing wilderness.[40] Overall, environmentalists attempted to prevent and fix the market failure that was caused by a small number of industries perpetuating environmental harm as a byproduct, while avoiding the repercussions of their actions.[41]

Beyond environmentalism, many saw market failures in everyday products that could be fixed through the use of collective litigation.[42] The free market during this time in history was not self-regulating due to insufficient information compounded by market distortions.[43] Additionally, the political process proved to be ineffective in regulating industrial activity.[44] As a result, corporations could sell large quantities of makeshift products without fallout from the market or the political process.[45] The hope was that collective action could give those wronged by defective products the same power that derives from the economies of scale as the manufacturer, show-

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[35] *See id.* (mentioning that *Brown* and *Hansberry v. Lee* were two cases in a "long series of lawsuits attacking segregated conditions"); *see also* Hansberry v. Lee, 311 U.S. 32 (1940) (a National Association for the Advancement of Colored People lawsuit attacking racial discrimination in housing). In *Brown v. Board of Education*, the Supreme Court held that segregation in schools denied plaintiffs equal protection of the laws under the Fourteenth Amendment and that separate educational facilities based on race were inherently unequal. 347 U.S. 483, 495 (1954).

[36] *See* YEAZELL, *supra* note 22, at 241–42. Presidents before 1964 often used "rhetorical gestures and occasional defensive moves" to placate civil rights-focused voters but failed to push for the sweeping changes that civil rights leaders desired. *See id.* at 242 (detailing measures by Presidents Truman, Eisenhower, and Kennedy).

[37] *See id*. at 243.

[38] *See id*.

[39] *See id.* at 244.

[40] *Id.*

[41] *Id.* These industries included energy and real estate development. *Id.*

[42] *See id.* at 243.

[43] *See id.*

[44] *Id.* Yeazell cites to various environmental disasters as well as General Motors' hiring of a private investigator to probe into Ralph Nader after his pro-consumer protection book was published about the dangers of the car industry. *Id.*

[45] *See id.* at 243−44.

ing that collective action was a "'mass production remedy' for 'mass production wrongs.'"[46]

B. Collective Litigation Procedure

The default structure of an American lawsuit is individual litigation.[47] Collective litigation is allowed, however, when a representative litigates the common claims of a class of individuals too numerous to join the case individually.[48] Class actions are representative suits on behalf of those who are absent and are similarly situated.[49] Class actions are a form of collective litigation, but are not the only form, and many forms have their own individual procedures.[50] For the purposes of this Note, both terms are used and distinctions occasionally are made, but class actions will be the form of collective litigation discussed herein because of their prevalence.[51] However, the core issue of mooting cases with unaccepted settlement offers affects various forms of collective litigation.[52]

In order for a case to move forward as a class action, a court must certify the class.[53] This typically occurs when a plaintiff moves for class certification, a defendant moves for an order denying class certification, or a party files either a cross-motion in support of or in opposition to a class certification, depending on its position.[54] These motions are adjudicated to de-

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[46] *Id*.

[47] RUBENSTEIN, *supra* note 8, § 1:3 (citing William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L. J. 1623, 1625 (1997)).

[48] RUBENSTEIN, *supra* note 8, § 1:2; *see* FED. R. CIV. P. 23. Not all collective litigation is conducted via FRCP 23 class actions. *See* 29 U.S.C. § 216(b) (2012). Many statutory collective action vehicles have procedures similar to FRCP 23, with some occasional modifications. *Compare*, 29 U.S.C. § 216(b) (requiring all plaintiffs who want to be a party to a suit to opt in by consenting in writing), *with* FED. R. CIV. P. 23(c) (discussing various ways the court must give notice to absent class members that often depends on the nature of the suit).

[49] RUBENSTEIN, *supra* note 8, at § 1:5.

[50] *Compare* 29 U.S.C. § 216(b) (permitting collective litigation for violations of the FLSA), *with* FED. R. CIV. P. 23 (prescribing methods for class litigation generally).

[51] *See* RUBENSTEIN, *supra* note 8, § 1:17.

[52] *Compare Genesis III*, 133 S. Ct. at 1527 (mooting the claim of a proposed representative prior to a class certification motion in collective FLSA suit and dismissing entire claim), *with* Diaz v. First Am. Home Buyers Prot. Corp., 732 F.3d 948, 950−51 (9th Cir. 2013) (mooting claims of a proposed representative in a class action prior to a class certification motion and dismissing the entire suit in district court).

[53] *See* FED. R. CIV. P. 23. FRCP 23 lists class certification requirements in subsections (a) (prerequisites for class action) and (b) (acceptable types of class actions). *See* FED. R. CIV. P. 23(a)−(b).

[54] RUBENSTEIN, *supra* note 8, § 7:1; *see* FED. R. CIV. P. 23(c).

termine if the class meets the requirements for certification under FRCP 23.[55]

First, FRCP 23(a) requires that the class be so large that a joinder of each member would be impracticable.[56] It also requires that there be a common question of law or fact among all members of the class.[57] Further, most important to the issue of mooting, the class must also have a representative whose claims or defenses are typical of those of the class and who will adequately represent the interests of the class.[58] Not satisfying any one of the requirements will result in the court denying the class certification motion.[59]

In addition to the prerequisites of FRCP 23(a), a potential class action must fit into one of the acceptable categories prescribed in FRCP 23(b).[60] The most common category met falls under FRCP 23(b)(3) when the court determines that questions of law or fact common to members of the class *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for the fair and efficient adjudication of the controversy.[61] FRCP 23(b)(1)(A) exists for situations in which inconsistent adjudications could lead to incompatible standards for defendants.[62] FRCP 23(b)(1)(B) establishes a mandatory class action when

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[55] FED. R. CIV. P. 23; RUBENSTEIN, *supra* note 8, § 7:2. To determine class certification in federal courts, FRCP 23 applies to cases with federal subject matter jurisdiction both for a federal question and for those with diversity of citizenship because the rule is a procedural one rather than one affecting the substance or merits of the case. *See* RUBENSTEIN, *supra* note 8, § 7:2.

[56] FED. R. CIV. P. 23(a)(1); RUBENSTEIN, *supra* note 8, § 1:2. This requirement is often referred to as numerosity. RUBENSTEIN, *supra* note 8, § 1:2.

[57] FED. R. CIV. P. 23(a)(2); RUBENSTEIN, *supra* note 8, § 1:2. This requirement is often referred to as commonality. RUBENSTEIN, *supra* note 8, § 1:2.

[58] FED. R. CIV. P. 23(a); RUBENSTEIN, *supra* note 8, § 1:2. These requirements are often referred to as typicality and adequacy, respectively. RUBENSTEIN, *supra* note 8, § 1:2.

[59] *See* Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982). A "class action . . . may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.*; *see* RUBENSTEIN, *supra* note 8, § 1:2. All the requirements of FRCP 23(a) must be met before a class action is certified. *See* RUBENSTEIN, *supra* note 8, § 1:1. A class certification motion should be made at an "early practicable time." Fed. R. Civ. P. 23(c)(1)(a). Any party can initiate a class certification motion. RUBENSTEIN, *supra* note 8, § 7:1. This critical determination on a class certification motion often occurs before any dispositive motion on a suit's merits. *See* RUBENSTEIN, *supra* note 8, § 7:8. The declining certification rate from around thirty-seven percent in 1996 to fewer than twenty percent by 2014 is its own social justice problem worthy of research and solutions, as certification greatly affects a class's ability to recover. *See* RUBENSTEIN, *supra* note 8, § 1:18.

[60] *See* FED. R. CIV. P. 23(b); RUBENSTEIN, *supra* note 8, § 1:3.

[61] *See* FED. R. CIV. P. 23(b)(3); RUBENSTEIN, *supra* note 8, § 1:3. This category is often used for class actions when each class member demands a small amount of money as recovery. *See* RUBENSTEIN, *supra* note 8, § 1:3.

[62] *See* FED. R. CIV. P. 23(b)(1)(A); RUBENSTEIN, *supra* note 8, § 1:3. The Advisory Committee imagined that this rule would be used for "[s]eparate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular

litigating rights in an individual manner would essentially eliminate claims of potential members.[63] FRCP 23(b)(2) allows for class actions when a party, likely a defendant, has taken or refused to take action with respect to the class, and the final judgment will be or at least will include equitable relief.[64]

The nature of class actions as representative suits on behalf of others similarly situated requires that absent, unnamed class members have specific rights and duties.[65] The absent class members have a nontraditional status in litigation because they are treated like parties for some purposes but not others.[66] Most importantly, the result of collective action is binding on absent class members unless they specifically opt out of the class action.[67]

C. Policy Benefits of Collective Litigation

There are four main policy benefits achieved through collective litigation: efficiency, compensation, deterrence, and legitimacy.[68] These goals are reflected in the rules governing collective action.[69]

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appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations." *See* Rules Advisory Committee's Note to Amended Rule 23, 39 F.R.D. 69, 100 (1966). This category is "somewhat opaque and rarely utilized." *See* RUBENSTEIN, *supra* note 8, § 1:3.

[63] *See* FED. R. CIV. P. 23(b)(1)(A); RUBENSTEIN, *supra* note 8, at § 1:3. This category is often referred to as a "limited fund" class action because the defendant has limited funds, making it incapable of satisfying all potential claimants. RUBENSTEIN, *supra* note 8, at § 1:3. The rule promotes fairness in this situation by giving each member a pro rata share of the recovery. *See id.*

[64] *See* FED. R. CIV. P. 23(b)(2); RUBENSTEIN, *supra* note 8, § 1:3. Actions utilizing this rule are often referred to as "civil rights" or "injunctive" class suits. *See* RUBENSTEIN, *supra* note 8, § 1:3.

[65] *See* RUBENSTEIN, *supra* note 8, § 1:5.

[66] *See id.* For example, in deciding whether a case has diversity jurisdiction, the court only considers the citizenship of the class representative. *Id.* The amount in controversy requirement, however, must be met by each class member in order to achieve diversity jurisdiction. *Id.* Additionally, absent class members are not required to appear before the court, are rarely subjected to counterclaims or cross-claims, and are only involved in discovery as third-party witnesses, rather than as a party. *Id.*

[67] *Id.* § 1:6. The default rule for FRCP 23 class actions is an opt-out provision, but some collective action processes, such as collective actions enforcing FLSA violations, require class members to opt in. *See* 29 U.S.C. § 216(b) (2012); *Genesis III* 133 S. Ct. at 1529.

[68] *See* RUBENSTEIN, *supra* note 8, §§ 1:7−10.

[69] *See* 29 U.S.C. § 216(b) (2012); FED. R. CIV. P. 23; Rules Advisory Committee's Note to Amended Rule 23, 39 F.R.D. 69, 102−03 (1966) (stating the policy that class actions would achieve "economies of time, effort, and expense, and promote uniformity of decision" for the class); RUBENSTEIN, *supra* note 8, §§ 1:3, 1:7−10. For example, the specific categories of qualified classes for classification represent these intentions. *See* FED. R. CIV. P. 23(b). FRCP 23(b)(1) prevents defendants from being subjected to two conflicting court orders, helping with legitimacy. FED. R. CIV. P. 23(b)(1); RUBENSTEIN, *supra* note 8, § 1:3. This rule also benefits all plaintiffs in the certified class; it ensures that if a defendant has limited resources, all plaintiffs can benefit from these resources, as opposed to leaving late plaintiffs empty-handed after early plaintiffs have had their claims fully paid, helping with both compensation and efficiency. RUBENSTEIN, *supra*

First, collective litigation promotes administrative efficiency by enabling claims to be processed through a representative, thus avoiding multiple identical actions.[70] Reducing identical actions saves the court's resources.[71] The named plaintiff can share the costs of litigation with his or her fellow class members.[72] These absent class members reap the benefits of the litigation without having to be actively involved.[73] Moreover, additional efficiency benefits emerge because collective litigation eliminates the risk of inconsistent results that may occur when similarly situated individuals bring identical claims against the same defendant.[74] Inconsistent results send confusing signals to potential plaintiffs looking to bring litigation and defendants hoping to comply with the law.[75]

From an economic perspective, collective actions permit plaintiffs "to pool claims which would be uneconomical to litigate individually."[76] Collective litigation, therefore, enables justice for individuals who have no practical means of compensation via individual litigation for small harms because the cost of the lawsuit would outweigh any individual recovery.[77] Collective litigation, ranging from consumer protection to employee rights,

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note 8, § 1:3. Other collective procedures, such as those governing FLSA collective action, also reflect these various goals, such as helping protect absent class members by requiring written consent before binding them to the result of the litigation. *See* 29 U.S.C. § 216(b).

[70] RUBENSTEIN, *supra* note 8, § 1:9 (citing Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 466 n.12 (1975) (acknowledging "the purposes of litigatory efficiency served by class actions")); Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974) (describing "efficiency and economy of litigation" as "a principal purpose of the [class action] procedure"). FRCP 23 is "designed to further procedural fairness and efficiency." RUBENSTEIN, *supra* note 8, § 1:9 (quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 402 (2010)).

[71] RUBENSTEIN, *supra* note 8, § 1:9. When similarly situated individuals have claims large enough that each would pursue these claims individually, collective litigation prevents the court from potentially having to manage a flood of identical, individual cases. *Id.*

[72] *Id.* Evidence shows that collective litigation reduces fees and costs for both the plaintiff and the court, and assuming each class member files an individual action, potentially for the defendants as well. *Id.*

[73] *Id.* Because a class representative stands in for them, class members are spared the time and energy of pursuing their own individual litigation. *Id.* Simply put: "An absent class action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course." *Id.* (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 (1985)).

[74] *See id*. § 1:9.

[75] *Id.* Class actions add an increased level of efficiency in cases litigated under FRCP 23(b)(3) because the required notice allows all class members to know about proposed relief and makes that relief available to those who want it, providing consistency for both plaintiffs and defendants alike. *See id.* Similar benefits are available to other collective action vehicles that include opt-in provisions. *See* 29 U.S.C. § 216(b) (2012).

[76] *See Phillips Petroleum,* 472 U.S. at 809.

[77] *See* RUBENSTEIN, *supra* note 8, § 1:7 (quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974) (noting that petitioner's individual potential award was only seventy dollars and that, accordingly, "[n]o competent attorney would undertake this complex antitrust action to recover so inconsequential an amount," but, instead, "[e]conomic reality dictates that petitioner's suit proceed as a class action or not at all")).

shows this principle in effect: even when each individual plaintiff's damages are minimal, litigation will continue to be vigorously pursued as it winds through several levels of appeals.[78]

Additionally, collective litigation deters misconduct that occurs when no individual actor has the financial incentive to sue.[79] By allowing collective suits that include multiple small claims, bad actors are exposed to liability, which deters their future misdeeds.[80] If plaintiffs were required to bring claims individually, bad actors would not be forced to pay for their misdeeds, as few plaintiffs would sue.[81] In this way, the compensation awarded following class actions to those wronged "provide[s] an important private supplement to public enforcement of social norms."[82]

Even for laws that charge public agencies with enforcement, effective compliance nationwide usually requires private litigation, often litigated collectively.[83] Consequently, several statutes aimed at promoting broad societal changes often depend on private litigation to enforce these important rights.[84] By forcing defeated defendants to pay for plaintiff's attorney's fees, class action enlists private attorneys to enforce rights that the government often cannot prosecute, further deterring more bad acts.[85] This creates an incentive for private attorneys to pursue small claims for groups of people.[86] In many ways, private attorneys enforce these major laws as so-called

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[78] *See Genesis III*, 133 S. Ct. at 1527 (reviewing suit concerning employer's failure to pay thirty minutes' worth of FLSA-required pay daily where the named plaintiff's unpaid wages were worth $7500 total); *Phillips Petroleum*, 472 U.S. at 809 (reviewing suit over gas company's failure to pay investors proper royalties where the value of each claim was worth $100); *Eisen*, 417 U.S. at 161 (reviewing suit where each individual's damages were only $70, implying that recovery was only available in collective litigation).

[79] RUBENSTEIN, *supra* note 8, § 1:8.

[80] *Id.*

[81] *See id.*

[82] *Id.*

[83] *Id.* This includes various employment and civil rights statutes. *See id.* "When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law." *Id.* (quoting Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401 (1968)).

[84] *See Newman*, 390 U.S. at 401 (discussing how the Civil Rights Act of 1964 relies on private litigation to "secur[e] broad compliance with the law"); DAU-SCHMIDT ET AL., *supra* note 2, at 419 (discussing how employees' rights under the FLSA can be enforced by the Secretary of Labor after an investigation by the Wage and Hour Division, but more often than not are enforced by the employee himself or herself).

[85] RUBENSTEIN, *supra* note 8, § 1:8.

[86] *Id.* This private enforcement may also be superior in some ways to public enforcement because of increased efficiency and less political constraint and motivation. *See id.* (citing Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 191; Mark A. Cohen & Paul H. Ruben, *Private Enforcement of Public Policy*, 3 YALE J. ON REG. 167, 168–69 (1985)). The sheer increase of enforcers, both public and private, allows for innovation and more protective litigation. *Id.* (citing Thompson, *supra*, at 206).

"private Attorney[s] General[]."[87] This army of plaintiffs' attorneys, acting as private attorneys general by enforcing society-altering statutes, deter bad acts by ensuring that defendants have to pay for the damage they cause as well as for the plaintiffs' attorneys' fees.[88] This deterrence of bad acts increases the overall efficiency of class actions because litigation relating to future acts is generally eliminated.[89]

The use of collective litigation strengthens the legitimacy of the legal system by preventing inconsistent opinions and protecting the interests of absent class members.[90] Although discrepancies between the elements of different cases, such as evidence or lawyering styles, may explain some inconsistent results for similar plaintiffs with similar claims, skepticism of the legal system resulting from inconsistent results dissipates when plaintiffs litigate together in a collective litigation.[91] Resolving numerous legal and factual issues for many different parties in one proceeding assures the consistent resolution of claims.[92] Additionally, class actions litigated under FRCP 23(b)(3) require notice to all class members of the proposed relief, making the relief equally available to the whole group.[93] The desire to avoid inconsistent results is so strong that, in some special circumstances where inconsistency is particularly problematic, FRCP 23 allows for mandatory classes to protect against the possibility of inconsistent results.[94] Collective litigation and its protections for absent class members aid the legitimacy of the legal system: for class actions, these protections include adequate representation, notice, and an opportunity to opt out of the class.[95]

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[87] *See* Associated Indus. of New York State v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943), *vacated*, 320 U.S. 707 (1943); *see also* Darren Carter, Note, *Notice and the Protection of Class Members' Interests*, 69 S. CAL. L. REV. 1121, 1123 (1996). The role of private attorneys general is not without its critics, but these attorneys often get recovery for their clients. *See* John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 215–19 (1983).

[88] *See* RUBENSTEIN, *supra* note 8, § 1:8.

[89] *See id.* § 1:9 ("The deterrent effect of the small-claims class action preserves public enforcement and judicial resources as it obviates the need for future enforcement proceedings.").

[90] *See id.* § 1:10.

[91] *See id.* (citing Payton v. Abbott Labs, 83 F.R.D. 382, 390 (D. Mass. 1979) ("A fundamental aspect of justice is parity of treatment. Persons similarly situated and aggrieved should be similarly treated."), *vacated*, 100 F.R.D. 336 (D. Mass. 1983)).

[92] *See* RUBENSTEIN, *supra* note 8, § 1:10.

[93] *See* FED. R. CIV. P. 23(b)(3); RUBENSTEIN, *supra* note 8, § 1:10.

[94] FED. R. CIV. P. 23(b)(1)(A); *see* RUBENSTEIN, *supra* note 8, § 1:10.

[95] RUBENSTEIN, *supra* note 8, § 1:10. Other protections mentioned include:

> [R]equiring court appointment and supervision of class counsel to ensure that they fairly and adequately represent class interests; court approval of any settlement, voluntary dismissal, or compromise relating to a claim, issue, or defense of a certified class; notice and an opportunity to object regarding a request for an award of attorneys' fees and nontaxable costs; and court findings of fact and conclusions of law regarding a request for attorneys' fees and nontaxable costs. The court also has

D. Collective Litigation's Critical Role in Achieving Social Justice

In recent decades, collective litigation has enabled significant social justice victories.[96] As Professor Stephen C. Yeazell explained, groups that have "occupied the fringes of social acceptance" often use collective litigation to bring about justice and social change.[97] Collective action "bring[s] otherwise powerless individuals together as a group [and] gives the class formidable strength, forcing state officials as well as corporate boardrooms to recognize the rights of the class when, on an individual level, such rights would likely be ignored."[98]

Over the past several decades, the Supreme Court and Congress have repeatedly created additional hurdles to successful class actions.[99] Despite these obstacles, collective action remains a strong avenue for many advocacy groups fighting for justice.[100] Groups utilizing collective action range from the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU), to the National Organization for Women (NOW) and environmental groups, and the social wrongs their efforts have sought to correct run the gamut from racial dis-

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> broad discretionary powers to assist in its supervision of the representative litigation including the ability to require appropriate notice to the class for various reasons throughout the course of the litigation and the ability to impose conditions on the representative parties or intervenors. Finally, the court has authority to alter or amend the class certification order at any time before final judgment.

Id. Other types of collective action litigation include stronger protections for absent class members. *See, e.g.*, 29 U.S.C. § 216(b) (2012).

[96] *See, e.g.*, Nicholas W. Edwards, Case Comment, *Class Action Public Nuisance: Cleveland's Real Chance at Taking on Subprime Lenders*, 38 U. DAYTON L. REV. 307, 334 (2013) (discussing the use of class action litigation to take on subprime lenders who helped cause the recent financial crisis); Krista Kauble, Case Comment, *Litigating* Keyes*: The New Opportunity for Litigators to Achieve Desegregation*, 31 CHICANA/O–LATINA/O L. REV. 103, 111–12 (2012) (stating that collective action litigation has greatly shaped public education in America over the past few decades); YEAZELL, *supra* note 22, at 267 (commenting on how collective litigation has helped "marginal social groups" achieve progress in areas such as civil rights).

[97] YEAZELL, *supra* note 22, at 267 (remarking that historical uses of group litigation, from villages to civil rights organizations, have "not always implied high social status").

[98] Carter, *supra* note 87, at 1121. Often, plaintiffs' attorneys leading the charge as private attorneys general ensure that rights are protected. *See* DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 71–72 (2000). These rights are enforced using various forms of collective action. *See id.* (discussing plaintiffs' attorneys using class actions to enforce rights); *see also Genesis III*, 133 S. Ct. at 1527 (using a collective action to enforce the FLSA).

[99] *See Eisen*, 417 U.S. at 178 (requiring plaintiffs to pay for notice to absent class members); Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 525–29 (2013) (detailing several congressional efforts to undermine collective litigation by restricting where certain kinds of class actions could be litigated and enabling defendants to remove away from "hellhole state courts" to federal court).

[100] *See* HENSLER ET AL., *supra* note 98, at 71–72.

crimination and segregation to fracking.[101] These groups are often able to avoid certain costs associated with collective litigation by demanding equitable relief, such as procedural changes or injunctions, in addition to monetary damages.[102] Thus, these practices help fulfill the aforementioned policy goals of class actions.[103] For example, *Cogdell v. Wet Seal*, a race-based employment discrimination class action brought and settled by the NAACP Legal Defense Fund, ensured compensation for harmed plaintiffs, deterred future discrimination, and attained equal and efficient justice for all those wronged without requiring each class member to bring suit individually.[104]

Beyond major, mainstream advocacy groups, collective action remains a significant tool for groups of individuals seeking justice against large, well-financed opponents.[105] Similar to civil rights organizations during the 1960s and 1970s, victims of abuses at the hands of a large, unified corporation often lack the organizational power to effectively advocate for the rectification of harms they have suffered.[106] Class actions in these situations provide recoveries for plaintiffs and eliminate a large corporation's financial incentive to externalize costs, such as the cost of making a safer or more environmentally friendly product.[107] Allowing this externalization would encourage corporations to spread small amounts of damages among large groups of people.[108] The only rational way to ensure compensation for indi-

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[101] *See id.*; Press Release, Cmty. Envtl. Legal Def. Fund, Lafayette, Colorado, Residents File Class Action Lawsuit Against State, Governor, and Colorado Oil and Gas Association: Asks Court to Overturn State Oil and Gas Act and Dismiss Industry Lawsuit Against Lafayette (Jun. 10, 2014) (on file with author); Press Release, American Civil Liberties Union, ACLU, NAACP Ask Court to Approve "DWB" Class Action Lawsuit Against Maryland State Police (Mar. 8, 2000), https://www.aclu.org/news/aclu-naacp-ask-court-approve-dwb-class-action-lawsuit-against-maryland-state-police [perma.cc/58D8-RE65].

[102] *See* YEAZELL, *supra* note 22, at 246–47. By demanding both monetary and equitable relief, these advocacy groups frequently benefit from FRCP 23(b)(2), which does not require plaintiffs to pay for notice to be sent to all absent class members. *See id.*; FED. R. CIV. P. 23(b)(2). FRCP 23(b)(2) was so often utilized by civil rights advocates that it was often referred to as the civil rights class action rule. *See* RUBENSTEIN, *supra* note 8, § 1:3.

[103] *See* RUBENSTEIN, *supra* note 8, §§ 1:7–10.

[104] *See* Settlement Agreement and Joint Stipulation, Cogdell v. Wet Seal, No. SACV 12-01138 (ANX) (C.D. Cal. June 11, 2013); Patrick Dorrian, *Clothier Wet Seal Agrees to Pay $7.5 Million to Settle Black Managers' Class Bias Claims,* BLOOMBERG LAW (May 13, 2013), http://www.bna.com/clothier-wet-seal-agrees-to-pay-7-5-million-to-settle-black-managers-class-bias-claims [perma.cc/H5XN-ZT79] (reporting settlement in response to suit filed by the NAACP against an employer whose executive tried to get rid of African-American employees and hire more white employees for the sake of "brand management"); RUBENSTEIN, *supra* note 8, at §§ 1:7–10 (stating that the goals of collective litigation are efficiency, compensation, deterrence, and legitimacy).

[105] *See Genesis III*, 133 S. Ct. at 1527; YEAZELL, *supra* note 22, at 243 (explaining class action as a tool to help individuals counterbalance industry's economy of scale).

[106] *See* YEAZELL, *supra* note 22, at 243.

[107] RUBENSTEIN, *supra* note 8, § 1:8; YEAZELL, *supra* note 22, at 243–44.

[108] RUBENSTEIN, *supra* note 8, § 1:8; YEAZELL, *supra* note 22, at 243.

viduals who have suffered mass-produced harm is a mass-produced remedy through collective action.[109] Even when governmental oversight or litigation is impractical or politically undesirable, aggrieved parties can still have their rights enforced through collective litigation while being represented by a "private attorney general."[110]

II. ARGUMENTS IN FAVOR OF AND AGAINST THE UNILATERAL MOOTING OF COLLECTIVE LITIGATION

Collective litigation may serve as the vehicle for efficient relief when an individual actor harms many.[111] Often, when the individual damages are minor yet a number of people are affected, the only way a defendant is forced to pay for its misdeeds is through collective litigation.[112] Collective litigation efforts to restore justice for wronged plaintiffs are undercut when a defendant is able to moot the claim.[113]

In some circuits, courts allow defendants to effectively dodge collective litigation and the payment of any resulting monetary damages before the class is certified by allowing the defendants to offer the class representative a settlement that completely satisfies his or her individual claim.[114] Regardless of whether the individual accepts the settlement offer, the court may enter judgment for the plaintiff and dismiss the individual claim because the individual no longer has a personal interest in the outcome of the action, making the claim moot.[115] The case is then over before a ruling on class certification.[116]

Although the defendant may have to pay the individual claim, this maneuver forces the class to find another representative before the remaining members can recover.[117] Even if another representative brings a case, the defendant is able to offer an individual settlement again, thus repeating the cycle.[118] This leaves class members with the doomed choice between either

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[109] *See Phillips Petroleum Co.*, 472 U.S. at 809 (plaintiffs suing gas company based on failure to pay investors proper royalties when the value of each claim was worth $100); RUBENSTEIN, *supra* note 8, § 1:8; YEAZELL, *supra* note 22, at 243–44.

[110] *See* HENSLER ET AL., *supra* note 98, at 71–72.

[111] *See* RUBENSTEIN, *supra* note 8, § 1:7.

[112] *See id.* (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974)).

[113] *See* Genesis Healthcare Corp. v. Symczyk (*Genesis III*), 133 S. Ct. 1523, 1536–37 (2013) (Kagan, J., dissenting).

[114] *See id.* at 1533. A request for monetary damages is a unique component. *See* RUBENSTEIN, *supra* note 8, § 2:12. If plaintiffs in a case request equitable relief only, they will be able to avoid possible motions to moot the case by the defendants. *See id.*

[115] *See Genesis III*, 133 S. Ct. at 1533 (Kagan, J., dissenting).

[116] *See id.* at 1536–37.

[117] *See id.*; *see also* O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 574 (6th Cir. 2009) ("An offer of judgment that satisfies a plaintiff's entire demand moots the case.").

[118] *See Genesis III*, 133 S. Ct. at 1533 (Kagan, J., dissenting).

bringing a case individually or forgoing any sort of recovery.[119] Circuits are split on the issue, but, regrettably, the majority follows the practice of mooting a claim with an unaccepted offer before a class certification motion is made, with only the proposed representative receiving compensation.[120] Even more problematic, some circuits do not enter judgment in favor of the plaintiff, leaving the plaintiff with no claim and not even the monetary settlement that the defendant was willing to pay.[121]

The application of the mootness doctrine to unaccepted settlement offers in pre-class certification collective litigation goes against logic, conflicts with the necessary policy benefits of collective litigation in our modern court system, and undermines any future social justice goals that could be achieved through collective litigation.[122]

A. Reasoning in Favor of Mooting a Case Prior to Class Certification

Circuits in favor of mooting claims prior to a class certification motion root their reasoning in the U.S. Constitution.[123] Article III of the Constitu-

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[119] *See* Weiss v. Regal Collection, 385 F.3d 337, 344 (3d Cir. 2004).

[120] *See* Diaz v. First Am. Home Buyers Prot. Corp., 732 F.3d 948, 953 (9th Cir. 2013) ("The majority of courts and commentators appear to agree with the Seventh Circuit that an unaccepted offer will moot a plaintiff's claim.") (citing to decisions from the Third, Fourth, Fifth, Seventh, and Tenth Circuits). The motion for class certification is critically important because the Supreme Court gradually developed the broad rule that once an order granting or denying class certification has issued, a class action will not be mooted even if the class representative's claim becomes moot. *See* RUBENSTEIN, *supra* note 8, § 2:10 (citing U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 404 (1980)).

[121] *Compare* Rand v. Monsanto Co., 926 F.2d 596, 598 (7th Cir. 1991) ("Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate, and a plaintiff who refuses to acknowledge this loses outright."), *overruled by* Chapman v. First Index, Inc., 796 F.3d 783 (7th Cir. 2015), *with O'Brien*, 575 F.3d at 574–75 ("The better approach is to enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer.").

[122] *See* 29 U.S.C. § 216(b) (2012); FED. R. CIV. P. 23; *Genesis III*, 133 S. Ct. at 1527–33, 1535 (Kagan, J., dissenting) (describing the logical flaws with mooting the proposed class representative's claim); *Weiss*, 385 F.3d at 344 (mooting claims and undermining the policy objectives of collective litigation); Payton v. Abbott Labs, 83 F.R.D. 382, 390 (D. Mass. 1979) (noting the importance of "parity of treatment" for the class aggrieved), *vacated*, 100 F.R.D. 336 (D. Mass. 1983); RUBENSTEIN, *supra* note 8, at §§ 1:7–10; ALICIA BANNON, BRENNAN CTR. FOR JUSTICE, FEDERAL JUDICIAL VACANCIES: THE TRIAL COURTS 1 (2013) (describing the slow pace of confirming federal judges in trial courts); ANDREW BLOTKY & SANDHYA BATHIJA, CTR. FOR AM. PROGRESS, FEDERAL JUDICIAL EMERGENCIES 1 (2013) (labeling the lack of federal trial court judges as "a crisis"); CHIEF JUSTICE JOHN G. ROBERTS, SUPREME COURT OF THE UNITED STATES STATEMENT ON 2012 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4–10 (2012), http://www.supremecourt.gov/publicinfo/year-end/2012year-endreport.pdf [perma.cc/DQ7W-2VYZ] (detailing the smaller budgets and larger caseloads of the modern federal court).

[123] *See* U.S. CONST. art. III, § 2, cl. 1 (limiting federal jurisdiction to "cases and controversies"); *O'Brien*, 575 F.3d at 574; *Weiss*, 385 F.3d at 340; RUBENSTEIN, *supra* note 8, at § 2:9.

tion limits the jurisdiction of federal courts to "cases and controversies."[124] When the issues are no longer live or the parties do not have a legally recognizable interest in the outcome, the case, whether individual or collective, becomes moot because the plaintiff lacks standing and thus the court lacks subject matter jurisdiction.[125]

Standing in federal courts requires the plaintiff to present an Article III case or controversy.[126] This constitutional limitation forces federal courts to only "adjudicat[e] actual and concrete disputes, the resolutions of which have direct consequences on the parties involved."[127] An offer of complete relief can moot a claim because, at the point of an offer, the plaintiff loses his or her personal interest in the outcome because accepting the offer is the same as completely winning the case.[128] If a plaintiff lacks personal interest, a case cannot continue.[129] Thus, proponents of the mootness doctrine see it as an important tool for ensuring federal courts do not reach beyond their constitutional role.[130]

The mootness doctrine becomes more complicated when considering a representative's continuation of litigation after his or her individual claim has become moot.[131] If the class representative has his or her claim mooted yet desires to keep litigating, he or she is litigating another person's claim.[132] Courts often allow a mooted class representative to continue the

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[124] *See* U.S. CONST. art. III, § 2, cl. 1; *Weiss*, 285 F.3d at 340 (citing Flast v. Cohen, 392 U.S. 83, 94 (1968)). Article III, Section 2, Clause 1 of the Constitution reads:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

U.S. CONST. art. III, § 2, cl. 1.

[125] *See Genesis III*, 133 S. Ct. at 1528; *Weiss*, 285 F.3d at 340 (citing Cnty. of Los Angeles v. Davis, 440 U.S. 625, 631 (1979)); RUBENSTEIN, *supra* note 8, § 2:9.

[126] RUBENSTEIN, *supra* note 8, § 2:9; *see* U.S. CONST. art. III, § 2, cl. 1.

[127] *See Genesis III*, 133 S. Ct. at 1528.

[128] *See id.*

[129] *Id.*

[130] RUBENSTEIN, *supra* note 8, § 2:9. Mootness results from Article III jurisdictional limits for federal courts but can be invoked in state courts for prudential, rather than constitutional, reasons. *See id.* ("Mootness in these states [without state constitutional justiciability clauses] is simply a principle of judicial restraint without any constitutional jurisdictional underpinnings.") (quoting Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1861 (2001)).

[131] *See id.*

[132] *Id.*

litigation because the case and controversy requirement is satisfied by the relationship between the class and the defendant.[133] The high bar of the procedural requirements that must be met for acceptance as the class representative qualifies the representative as having a sufficiently personal stake for Article III purposes, and he or she must pursue the class's claim as vigorously as his or her own individually.[134]

This complication arises because courts hesitate to apply mootness rules strictly in the class context.[135] Even if a representative's claims are mooted, he or she still has the incentive to continue litigation vigorously to spread the costs of litigation to other members of the class.[136] Courts are sometimes reluctant to strictly apply the mootness doctrine in a collective litigation context because defendants could frustrate class certification simply by offering complete recovery, mooting the class representative's claim, and ending the entire litigation without any remedy for the rest of the class.[137]

To ensure the legitimacy and availability of collective action, courts created exceptions to the mootness doctrine for collective situations.[138] Most importantly for this context are the exceptions relating to class certification.[139] Once a district court has ruled on a class certification motion, the mooting of a class representative's claim usually will not moot the class action.[140] The Supreme Court has clearly said that even the denial of class certification will not allow the mooting of the representative's claim to moot the entire class's case.[141] The mooted class representative may still appeal the denial of class certification because the Federal Rules of Civil

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[133] *Id.* (citing Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 755–56 (1976) (ruling that the controversy was satisfied between the certified class and the defendant)).

[134] *See* U.S. CONST. art. III; FED. R. CIV. P. 23(a)(4) ("[T]he representative parties will fairly and adequately protect the interests of the class."); RUBENSTEIN, *supra* note 8, § 2:9 (citing *Geraghty*, 445 U.S. at 404 (holding that the plaintiff must satisfy the personal stake requirement of FRCP 23(a)(4), which is a higher threshold than Article III of the Constitution).

[135] *See* Clark v. State Farm Mut. Auto. Ins. Co., 590 F.3d 1134, 1138 (10th Cir. 2009) (noting that "the Supreme Court has applied the mootness doctrine less strictly in the class action context"); RUBENSTEIN, *supra* note 8, § 2:9.

[136] *See* RUBENSTEIN, *supra* note 8, § 2:9.

[137] *See id.*

[138] *See id.*

[139] *See id.* Other exceptions exist for specific substantive claims that occur in collective litigation, such as inherently transitory claims. *See id.* § 2:12. Additional exceptions include claims for just injunctive relief or mootness due to voluntary cessation of illegal conduct where there is no reasonable expectation that the harm will be repeated. *See id.* These exceptions are important but beyond the scope of this Note.

[140] *See id.* § 2:10 (citing *Geraghty*, 445 U.S. at 404).

[141] *Geraghty*, 445 U.S. at 388.

Procedure ("Federal Rules") give the proposed representative the right to have the class certified if the specific rule's requirements are met.[142]

Proponents of mooting collective actions before class certification differentiate pre-certification mooting from the other mootness exceptions.[143] This is because absent class members acquire a separate legal interest only when a class certification motion has been made, regardless of the court's response to such a motion.[144] An offer made prior to a class certification motion is aimed at just the individual proposed class representative when no separate interest for the class exists; therefore, proponents argue that when the representative's claim is mooted, no other live claim exists.[145]

B. Logical Problems with Mooting a Case Prior to Class Certification

Allowing a defendant to moot a class representative's claim prior to class certification is problematic at best.[146] Most circuits have determined that if the proposed class representative's case has been mooted before a class certification motion has been made, then the court must dismiss the case for lack of subject-matter jurisdiction because, at that point, it is essentially an individual case that has been mooted.[147]

In addition to inappropriately conflating the important differences between collective and individual litigation, this approach of mooting collective litigation cases prior to class certification effectively ends a proposed class representative's claim, regardless of whether a motion for class certifi-

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[142] *See* RUBENSTEIN, *supra* note 8, § 2:10 (citing *Geraghty*, 445 U.S. at 402). The Court mentions that applying the "personal stake" analysis is difficult for a procedural motion. *See Geraghty*, 445 U.S. at 422. The Court resolves this by calling it a "false dilemma" because class certification issues are "ancillary to the litigation of substantive claims." *See Geraghty*, 445 U.S. at 422 (quoting Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 332 (1980)).

[143] *See* RUBENSTEIN, *supra* note 8, § 2:9.

[144] *See id.*

[145] *See id.*

[146] *See Roper*, 445 U.S. at 340 n.12 ("Difficult questions arise as to what, if any, are the named plaintiffs' responsibilities to the putative class *prior* to certification."); RUBENSTEIN, *supra* note 8, § 2:11 ("The problematic area concerns class claims that are live when filed but moot before adjudication of the class certification motion.").

[147] *See Diaz*, 732 F.3d at 952−53 (discussing different approaches taken by circuits after determining the proposed representative's claim is moot); *O'Brien*, 575 F.3d at 575 (entering judgment for plaintiff who received offer for complete recovery); *Rand*, 926 F.2d at 598 (stating that a plaintiff who refused to accept complete recovery "loses outright"). Once the offer for complete recovery has been made, district courts within the U.S. Court of Appeals for the Sixth Circuit's jurisdiction enter judgment for the plaintiff. *See O'Brien*, 575 F.3d at 574−75. ("[T]he better approach is to enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer of judgment."). The U.S. Court of Appeals for the Seventh Circuit, however, has responded to a plaintiff's rejection of an offer for complete recovery by dismissing the case for lack of subject-matter jurisdiction. *See Rand*, 926 F.2d at 598.

cation had been made.[148] The differentiation based on whether the settlement offer occurs before or after a class certification motion has been made overlooks the fact that litigation filed in a collective nature is inherently designed to include more than the proposed representative's claim.[149]

Under the mootness doctrine, a court has discretion to end a lawsuit "when the defendant unconditionally surrenders and only the plaintiff's obstinacy or madness prevents her from accepting total victory."[150] For a case to be moot, the mooted party must have no concrete interest at all in the litigation.[151] An unaccepted offer to settle a claim, however, is equivalent to the offer never existing in the first place.[152] "Merely receiving an offer does not moot any claim."[153]

Moreover, the choice to bring a case collectively rather than individually shows that the proposed representative has an interest in his or her fellow class members' cases.[154] If nothing else, bringing the case collectively will reduce fees and costs for all members of the class.[155] The suit will be a stronger deterrent as more plaintiffs and higher damages will prevent repeat behavior.[156]

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[148] *See Genesis III*, 133 S. Ct. at 1533−35 (Kagan, J., dissenting) (detailing the various problems with this approach).

[149] *See id.* at 1535; Sosna v. Iowa, 419 U.S. 393, 393 (1975) (explaining that the test for whether a mooted FRCP 23 class action representative could pursue a class's claim was whether he could "fairly and adequately protect the interests of the class" irrespective of when the offer was made).

[150] *Genesis III*, 133 S. Ct. at 1536 (Kagan, J., dissenting).

[151] *Id.* at 1533. ("As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.") (quoting Chafin v. Chafin*,* 133 S. Ct. 1017, 1023 (2012)).

[152] *See id.* at 1533–34 ("An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect. As every first-year law student learns, the recipient's rejection of an offer 'leaves the matter as if no offer had ever been made'. . . assuming the case was live before—because the plaintiff had a stake and the court could grant relief—the litigation carries on, unmooted.") (quoting Minneapolis & St. Louis Ry. Co. v. Columbus Rolling Mill*,* 119 U.S. 149, 151 (1886)).

[153] *Genesis III*, 133 S. Ct. at 1535 (Kagan, J., dissenting).

[154] *See* Symczyk v. Genesis Healthcare Corp. (*Genesis I*)*,* No. 09-5782, 2010 WL 2038676, at *1 (E.D. Pa. May 19, 2010); RUBENSTEIN, *supra* note 8, §§ 1:7, 1:9−10.

[155] *See* RUBENSTEIN, *supra* note 8, § 1:9 (citing Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL L. STUDIES 27, 64 (2004)).

[156] *See id.* § 1:8. Allowing collective litigation is especially important for deterring questionable employment practices. *See Genesis III*, 133 S. Ct. at 1527 (plaintiff bringing collective FLSA action against her employer on behalf of her and her co-workers); RUBENSTEIN, *supra* note 8, § 1:18 (stating labor and employment cases are among the most frequent type of class action).

Consider that collective action litigation requires specific procedural protections to ensure adequate representation.[157] This is because collective litigation is essentially representative litigation through which a proposed representative litigates on behalf of absent, similarly situated members.[158] The absent class members are bound by the outcome of the representative's litigation notwithstanding its favorability.[159] This form of vicarious representation is only allowed because of the procedural rules in collective litigation that protect absent class members.[160]

Logic accordingly follows that an action on behalf of a class does not become moot even after the representative's claim has been mooted.[161] This is true even if a lower court denies class certification.[162] If the representative overcomes the procedural obstacles, the timing of the class certification motion should be irrelevant.[163] As long as the proposed representative still wants to represent the class and can adequately do so, an unaccepted offer for complete recovery for only the class representative should not terminate the case.[164]

C. Policy Ramifications of Mooting Cases Prior to Class Certification

Mooting a proposed representative's claim undercuts the policy benefits that collective litigation achieves: efficiency, compensation, deterrence, and legitimacy.[165] These benefits are virtually non-existent if a proposed representative's claims are mooted following a settlement offer.[166] Even

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[157] *See* 29 U.S.C. § 216(b) (2012) (requiring written consent of absent class members for FLSA actions); FED. R. CIV. P. 23(a)(4) (requiring adequate representation of the class); RUBENSTEIN, *supra* note 8, § 1:1.

[158] *See* RUBENSTEIN, *supra* note 8, § 1:1.

[159] *See id.* (citing Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 363 (1921)). The decision explains:

> Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court.

Cauble, 255 U.S. at 363 (quoting Smith v. Swormstedt, 57 U.S. 288, 301, 16 How. 288 (1853)).

[160] *See* 29 U.S.C. § 216(b); FED. R. CIV. P. 23 (ensuring the same result for all members of the class action); RUBENSTEIN, *supra* note 8, § 1:1.

[161] *See* RUBENSTEIN, *supra* note 8, § 2:9 ("Concluding that if a class action is moot once the representatives' claims become moot this would present conceptual difficulties.").

[162] *See id.* § 2:10 (citing *Geraghty*, 445 U.S. at 388, 404).

[163] *See id.* §§ 2:9–:10.

[164] *See Genesis III*, 133 S. Ct. at 1533 (Kagan, J., dissenting).

[165] *See Weiss*, 385 F.3d at 344; RUBENSTEIN, *supra* note 8, §§ 1:7–10.

[166] *See Weiss*, 385 F.3d at 344; RUBENSTEIN, *supra* note 8, §§ 1:7–10.

some circuits in favor of mooting class representative's claims recognize the danger of this practice.[167]

The benefits of collective litigation are especially needed in today's over-burdened, underfunded courts.[168] The highly publicized and significant level of debt in the federal government has caused the federal government, including the judiciary, to focus on maximizing efficiency and reducing costs, creating additional stress for the nation's court systems.[169]

Unfortunately, the slow pace of nominating and confirming judges has exacerbated the current strain on federal courts.[170] In 2013, 170 million Americans lived in a jurisdiction in which the court system declared a judicial emergency.[171] Much of the media attention focused on the vacancies in appellate courts, but the trial courts, which resolve the vast majority of federal cases, are also in crisis.[172] A shortfall in judicial resources, including a decrease in judges, leads to delay or denial of justice for those looking to the court for help.[173] This delay is incredibly harmful for groups seeking well-deserved judicial relief, including employees and unions who have been denied workplace fairness, consumers wronged by noxious products, and minorities claiming denials of their fundamental civil rights.[174]

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[167] *See, e.g.*, *Weiss*, 385 F.3d at 344 (explaining that "[a]llowing the defendants here to 'pick off' a representative plaintiff with an offer of judgment less than two months after the complaint is filed may undercut the viability of the class action procedure, and frustrate the objectives of this procedural mechanism for aggregating small claims").

[168] *See* BANNON, *supra* note 122, at 1 (explaining the alarming vacancy rates in federal district courts); BLOTKY & BATHIJA, *supra* note 122, at 1 (declaring that two thirds of Americans live in judicial districts with so many vacancies that it is considered a federal judicial emergency); ROBERTS, *supra* note 122, at 4–10 (discussing how the federal courts have focused on reducing costs).

[169] *See* ROBERTS, *supra* note 122, at 4–9 (detailing how the Judiciary has focused on reducing rent, information technology, and personnel expenses). Chief Justice Roberts points out that the Judiciary received an appropriation of $6.97 billion out of a total federal budget of $3.7 trillion, or approximately two tenths of a percent of the budget. *Id.* at 3–4.

[170] BANNON *supra* note 122, at 1.

[171] BLOTKY & BATHIJA, *supra* note 122, at 1. The nonpartisan Administrative Office of the United States Courts makes that determination and defines a judicial emergency as "a circuit court vacancy and adjusted case filings greater than 700, or an eighteen-month vacancy and filings between 500 and 700; or a district court vacancy with filings greater than 600, an eighteen-month vacancy where weighted filings are between 430 and 600, or any court with more than one judgeship and only one active judge" *Id.*

[172] BANNON, *supra* note 122, at 1. Out of 677 judgeships, there have been more than sixty vacancies during the entire Obama administration. *Id.* This leaves judges—already burdened with heavy caseloads—with an insurmountable amount of work. *Id.*

[173] *See id.*; ROBERTS, *supra* note 122, at 9. This concern led Supreme Court Chief Justice John Roberts to call on the Executive and Legislative branches to "act diligently in nominating and confirming" judges to fill vacancies. ROBERTS, *supra* note 122, at 9–10.

[174] *See* RUBENSTEIN, *supra* note 8, § 1:8. The majority of class actions that are filed in federal court are "securities, antitrust, labor and employment, consumer, employee benefits, and civil rights." *Id.*

The judiciary is not the only system strapped for cash during the current economic downturn.[175] The federal government, also feeling the ripple effects from the tightening of budgets, needs the cost-saving benefits that collective litigation provides.[176] Recent cuts in the federal government's budget have detrimentally impacted law enforcement agencies, such as the U.S. Departments of Justice and Labor, thus preventing them from effectuating their responsibilities of enforcing critical statutes.[177] Compensating harmed plaintiffs through collective action, however, "provide[s] an important private supplement to public enforcement of social norms."[178] Public agencies with enforcement power still need private litigation to ensure compliance.[179] Collective action enlists private sector attorneys as private attorneys general to enforce rights that the government often cannot prosecute, which is especially necessary in light of reduced federal budgets.[180]

Litigating similar cases individually rather than collectively wastes judicial and federal resources at a time when the government can least afford to do so.[181] When one plaintiff represents all similarly situated plaintiffs, costs are reduced for the parties involved and the court system.[182] Courts, for instance, only have to spend resources on one case, thus reducing case-

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[175] *See* Pete Yost, *Eric Holder Delaying Justice Department Furlough Decisions Until Mid-April,* POLITICO (Mar. 28, 2013, 4:53 PM), http://www.politico.com/story/2013/03/justice-department-furlough-decision-delayed-089441 [perma.cc/HLQ3-6HG7] (reporting how the justice department dealt with a budget cut of millions of dollars); Josh Hicks, *Equal Employment Opportunity Commission Faces Furloughs if Sequester Continues*, WASH. POST (Mar. 21, 2013), http://www.washingtonpost.com/blogs/federal-eye/wp/2013/03/21/equal-employment-opportunity-commission-faces-furloughs-if-sequester-continues [perma.cc/6QPC-MX9J]; Stephen Losey, *Labor Dept. Employees Get Furlough Notices*, FEDERAL TIMES (Mar. 8, 2013, 12:33 PM), http://www.federaltimes.com/article/20130308/AGENCY01/303080002/Labor-Dept-employees-get-furlough-notices?odyssey=tab|topnews|text|FRONTPAGE [perma.cc/P7MR-4QW3]; ROBERTS *supra* note 122, at 4–10.

[176] *See* Yost, *supra* note 175; Hicks, *supra* note 175; Losey, *supra* note 175; ROBERTS, *supra* note 122, at 4–10.

[177] *See* Yost, *supra* note 175 (detailing measures that U.S. Attorney General Eric Holder took to manage $1.6 billion dollar cut in Department of Justice funding); Hicks, *supra* note 175 (describing the potential furloughs that the EEOC faced as a result of a five percent budget cut, including the backlog of workplace discrimination cases, expected to grow by almost forty percent); Losey, *supra* note 175 (describing that the Department of Labor furloughed 4700 employees, or twenty-eight percent of its workforce, as a result of the 2013 federal budget cuts).

[178] RUBENSTEIN, *supra* note 8, § 1:8.

[179] *Id*. "When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law." *Id*. (quoting Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401 (1968)).

[180] *Id.* § 1:8 (discussing how private sector attorneys often enforce rights that the public sector has the ability to enforce); *see* Yost, *supra* note 175; Hicks, *supra* note 175; Losey, *supra* note 175.

[181] *See* RUBENSTEIN, *supra* note 8, §1:9; BANNON, *supra* note 122, at 1; BLOTKY & BATHIJA, *supra* note 122, at 1; ROBERTS *supra* note 122, at 4–10.

[182] *See* RUBENSTEIN, *supra* note 8, § 1:9.

loads.[183] Additionally, plaintiffs share the cost of bringing the suit, allowing absent class members to avoid being financially or physically involved.[184] Defendants only have to defend one case, and all parties avoid the risk of inconsistent results that may occur when similarly situated plaintiffs bring identical claims.[185] As follows, allowing defendants to undercut collective action by mooting cases prior to class certification eliminates the increased efficiency collective action provides; mooting the proposed representative's claim would allow plaintiffs to re-file collective actions only if they are able to find a new class representative, wasting the resources of all parties involved.[186] Because the damages involved in individual claims are relatively small, the burden of this unnecessary litigation would fall almost exclusively on federal district courts, which are already severely overworked.[187]

Increased efficiency also leads to greater justice, which is especially needed in these modern times of reduced federal budgets.[188] From an economic perspective, collective actions permit plaintiffs "to pool claims which would be uneconomical to litigate individually," allowing those alleging small amounts of monetary damages to overcome the cost of litigation.[189] In addition, accepting these cases collectively rather than individually provides the court with the capacity to administer justice to more plaintiffs at once in a more timely fashion.[190] If these cases were mooted prior to class certification, these claims would have to be dealt with individually, delaying justice for plaintiffs in need.[191] Individual cases would be the better of two bad options; the worse and more likely option would be leaving those turning to

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[183] *See id.*

[184] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 (1985). "An absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course . . . ." *Id.*; RUBENSTEIN, *supra* note 8, § 1:9.

[185] *See* RUBENSTEIN, *supra* note 8, § 1:9.

[186] *See Genesis III*, 133 S. Ct. at 1535 (Kagan, J., dissenting).

[187] *See, e.g.*, *Genesis III*, 133 S. Ct. at 1527 (majority opinion) (stating that the proposed representative's individual claim in a collective FLSA case was only worth about $7500); *Phillips Petroleum Co.*, 472 U.S. at 809 (class action in federal court concerned a gas company's failure to pay investors royalties, with each claim worth $100); *Eisen*, 417 U.S. at 161 (class action in federal court where each individual's damages were only $70); *see also* BANNON, *supra* note 122, at 1. Large class actions that lack a federal question often get brought into federal court using supplemental jurisdiction where there are more than 100 class members or more than $5 million in damages. *See* RUBENSTEIN, *supra* note 8, § 6:12.

[188] *See Genesis III*, 133 S. Ct. at 1527; *Phillips Petroleum Co.,* 472 U.S. at 809; RUBENSTEIN, *supra* note 8, § 1:7; Yost, *supra* note 175; Hicks, *supra* note 175; Losey, *supra* note 175; ROBERTS, *supra* note 122, at 4–10.

[189] *Phillips Petroleum Co.*, 472 U.S. at 809; RUBENSTEIN, *supra* note 8, § 1:7.

[190] *See Phillips Petroleum Co.*, 472 U.S. at 809; ROBERTS, *supra* note 122, at 4–10.

[191] *See Genesis III*, 133 S. Ct. at 1535 (Kagan, J., dissenting); *Phillips Petroleum Co.*, 472 U.S. at 809; RUBENSTEIN, *supra* note 8, § 1:7; ROBERTS, *supra* note 122, at 4–10.

federal courts for justice uncompensated as "economic reality" forces many suits to be collective or not brought at all.[192]

Mooting collective actions also eliminates the benefits of deterrence because it significantly reduces the financial incentive to sue.[193] Collective action deters bad acts because it incentivizes suits against bad actors that harm many, regardless of whether each individual recovery would be enough to justify a suit.[194] This inherently reduces the burden on public officials charged with enforcement, an especially worthy goal considering the current slimmed-down government budgets and bloated federal debt.[195] Moreover, deterrence adds to the overall efficiency of the court system.[196] If bad actors are deterred from committing bad acts, no actual harm would occur and litigation would therefore be unnecessary.[197] Mooting the proposed representative's claims, however, would eliminate this deterrent effect of collective litigation.[198]

Additionally, mooting a claim abuses the legitimacy of the legal system by infringing upon the rights of absent members and creating inconsistent results among similarly situated plaintiffs who are forced to litigate separately.[199] If many similar claims are litigated individually, yet garner conflicting results, it weakens the notion of uniform justice.[200] Also, mooting a representative's case forces class members to choose between litigating individually—and thus running up against unpredictable results, or not moving forward with litigation—and thus forgoing any potential recovery.[201]

D. Mooting Collective Litigation and the Compromise of Social Justice

The mooting of collective litigation with unaccepted settlement offers negatively impacts marginalized groups such as low-income workers and consumers who lack the financial resources necessary to successfully liti-

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[192] *See Eisen*, 417 U.S. at 161.

[193] *See id.*; *Weiss*, 385 F.3d at 344 (stating that mooting actions with an unaccepted settlement offer frustrates the objectives of collective litigation); RUBENSTEIN, *supra* note 8, § 1:8.

[194] *See* RUBENSTEIN, *supra* note 8, § 1:8.

[195] *See id.*; ROBERTS, *supra* note 122, at 4–10. The sheer increase of enforcers, both public and private, allows for innovation and more protective litigation. RUBENSTEIN, *supra* note 8, § 1:8 (citing Thompson, *supra* note 86, at 206).

[196] *See* RUBENSTEIN, *supra* note 8, § 1:9. "The deterrent effect of the small-claims class action preserves public enforcement and judicial resources as it obviates the need for future enforcement proceedings." *Id.*

[197] *See id.*

[198] *See Weiss*, 385 F.3d at 344; RUBENSTEIN, *supra* note 8, § 1:9.

[199] *See Weiss*, 385 F.3d at 344; RUBENSTEIN, *supra* note 8, § 1:10.

[200] *See Payton*, 83 F.R.D. at 390 ("A fundamental aspect of justice is parity of treatment. Persons similarly situated and aggrieved should be similarly treated."); RUBENSTEIN, *supra* note 8, § 1:10.

[201] *See Eisen*, 417 U.S. at 161; *Weiss*, 385 F.3d at 344; RUBENSTEIN, *supra* note 8, § 1:10.

gate a costly lawsuit against a powerful corporation.[202] Considering the major role that collective action has played in activist organizations, this practice impairs organizations that are fighting for justice, such as those focused on racial equality or environmental justice.[203]

The current practice of mooting claims prior to a class certification motion has already produced negative repercussions for marginalized groups, from workers being denied minimally required compensation to consumers demanding compensation after being misled and mistreated by a national insurance company.[204] Several recent cases demonstrate these repercussions.[205] In *Genesis Healthcare Corp. v. Symczyk*, discussed in the Introduction of this Note, workers attempted to recoup federally-mandated minimum compensation for completed work that their employer did not pay.[206] The proposed representative's claim was mooted, and none of the thousands of workers who would potentially have been in the class received compensation, including the representative who failed to accept the offered relief.[207]

A comparable story of pre-class certification mooting and dismissal occurred in *McCauley v. Trans Union*, a suit against a credit-reporting agency that allegedly violated the Fair Credit Reporting Act by negligently indi-

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[202] *See Genesis III*, 133 S. Ct. at 1527 (holding moot the plaintiff's claim in collective litigation attempting to enforce hospital employees' FLSA rights); *Diaz*, 732 F.3d at 949–55 (addressing consumer that was contesting the mooting of her collective fraud case against an insurance company); *O'Brien*, 575 F.3d at 572 (holding that McDonald's workers' collective FLSA claim was mooted by an unaccepted settlement offer for the proposed representative); McCauley v. Trans Union, 402 F.3d 340, 340–42 (2d Cir. 2005) (holding moot a case brought by consumers that were harmed by a negligent consumer reporting agency).

[203] *See In re Deepwater Horizon*, 732 F.3d 326, 329 (5th Cir. 2013) (collective suit against those responsible for the Deepwater Horizon oil spill that caused millions of barrels of oil to spill into the Gulf of Mexico); Dorrian, *supra* note 104 (discussing a NAACP suit combating workplace discrimination); YEAZELL, *supra* note 22, at 244−45.

[204] *See Genesis III*, 133 S. Ct. at 1527 (mooting a proposed collective FLSA case on behalf of hospital workers seeking minimum compensation with an unaccepted settlement offer); *Diaz*, 732 F.3d at 949–55 (overturning the granting of a mooting motion in consumers' class action against an insurance company that provided poor service); *O'Brien*, 575 F.3d at 572 (mooting McDonald's worker's proposed collective FLSA case with an unaccepted settlement offer for the proposed representative); *McCauley*, 402 F.3d at 340−42 (mooting a proposed collective litigation case brought by consumers against a negligent credit reporting agency when the proposed representative received a settlement offer for complete recovery).

[205] *See Genesis III*, 133 S. Ct. at 1527; *Diaz*, 732 F.3d at 949–55; *O'Brien*, 575 F.3d at 572; *McCauley*, 402 F.3d at 340–42.

[206] *See Genesis III*, 133 S. Ct. at 1527. Like many proposed representatives, the workers in *Genesis* could not determine the number of workers who could belong to the class because of the lack of discovery, but the number was likely several thousand. *See* Complaint, *supra* note 5, at 6.

[207] *See Genesis III*, 133 S. Ct. at 1527, 1532. Genesis was not the only employer that attempted to use unaccepted offers to moot their employees' collective FLSA claim. *See O'Brien*, 575 F.3d at 572 (mooting FLSA action brought by McDonald's employees due to unaccepted settlement offer).

cating false liens on consumers' credit reports, leading class members to be forced to pay additional and inappropriate fees.[208] Finally, *Diaz v. First American Home Buyers Protection Corp.* involved a consumer who sued her insurance company on behalf of herself and potentially hundreds of thousands of other policyholders in response to the company's practice of refusing to make timely repairs, using substandard contractors, and wrongfully denying legitimate claims.[209] The U.S. District Court for the Southern District of California dismissed the collective suit after the initial consumer who filed suit refused to accept an individual offer for complete recovery.[210] The only way she could continue pursuing recovery for the class would be if an appeals court rejected the mooting of the class representative's claim.[211]

The threat of having a proposed representative's claim, and therefore the whole class action, mooted looms over groups that use collective litigation to fight for justice.[212] Collective litigation has long been a tool for change and organization for advocates promoting racial equality and environmental justice.[213] This strategy continues today.[214] Mooting permits defendants to avoid paying damages for everything from workplace discrimination to massive oil spills, leaving victims uncompensated and bad actors undeterred from committing further unjust acts.[215]

III. ATTAINABLE FIXES THAT WILL PRESERVE COLLECTIVE LITIGATION AS AN AVENUE FOR JUSTICE

Justice requires that courts avoid the unilateral mooting of collective actions.[216] The Supreme Court has the ability and had the opportunity to

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[208] *See McCauley,* 402 F.3d at 340–42. Trans Union had negligently and falsely indicated on the plaintiff's credit report that he had outstanding tax liens. *Id.* at 340. This prevented the plaintiff from securing a student loan. *Id.* He demanded $240, which was the amount of the fee he had to pay when he used his credit card to pay his $8000 tuition. *Id.* at 340–41.

[209] *See Diaz*, 732 F.3d at 949; Complaint at 2, Diaz v. First Am. Home Buyers Prot. Corp., 732 F.3d 948 (9th Cir. 2013) (No. 3:09-cv-00775).

[210] *Diaz*, 732 F.3d at 950–51.

[211] *See id*. at 953–55.

[212] *See In re Deepwater Horizon*, 732 F.3d at 329 (collective suit against massive polluters responsible for the Deepwater Horizon oil spill requesting tremendous damages that would likely be reduced if litigated individually); Dorrian, *supra* note 104 (discussing NAACP collective suit contesting workplace discrimination that would be more difficult to prove if litigated individually); YEAZELL, *supra* note 22, at 244–45.

[213] *See* YEAZELL, *supra* note 22, at 244–45 (detailing how collective litigation is part of the strategy for civil rights and environmental groups to achieve change).

[214] *See In re Deepwater Horizon*, 732 F.3d at 329; Dorrian, *supra* note 104.

[215] *See supra* note 204 and accompanying text.

[216] *See* Genesis Healthcare Corp. v. Symczyk (*Genesis III*), 133 S. Ct. 1523, 1533–35 (2013) (Kagan, J., dissenting); Diaz v. First Am. Home Buyers Prot. Corp., 732 F.3d 948, 953 (9th Cir. 2013) (evidencing that a majority of courts decide that an unaccepted offer can moot a claim);

remedy this problem.[217] The Court, however, chose not to invalidate this application of the mootness doctrine, making a judicial solution to this judicial problem unlikely.[218]

Another resolution, however, may be reached by amending the Federal Rules of Civil Procedure ("Federal Rules") to clearly limit the power of Federal Rule of Civil Procedure ("FRCP") 68 settlement offers and to revise the role that FRCP 68 plays in the settlement process.[219] Some have criticized the role that FRCP 68 has played in the settlement process.[220] To limit the rule's power, several district courts have taken different approaches, but each of these approaches has its own shortcomings.[221] The problem goes beyond what district courts can do: its solution requires fixing FRCP 68.[222]

The change needed to be made to FRCP 68 in order to properly effectuate the policy goals of collective litigation is simple; the process of implementing the change, however, is far more difficult.[223] Amending FRCP

Weiss v. Regal Collection, 385 F.3d 337, 344 (3d Cir. 2004) (mooting collective cases with unaccepted offers frustrates the objectives of collective litigation).

[217] *See Genesis III*, 133 S. Ct. at 1534–35 (Kagan, J., dissenting) (illustrating that the issue of unilateral mooting of collective actions is "part and parcel of . . . the question Genesis presented for our review" yet the court does not resolve the issue).

[218] *See id.*

[219] *See* Rules Enabling Act of 1934, 28 U.S.C. §§ 2071–2077 (2012); FED. R. CIV. P. 68; *Genesis III*, 133 S. Ct. at 1535–37 (Kagan, J., dissenting) (discussing the role that FRCP 68 plays in the mooting of claims); *see also How the Rulemaking Process Works: Overview for the Bench, Bar, and Public*, U.S. COURTS, http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/how-rulemaking-process-works/overview-bench-bar-public.aspx#summary-procedures [perma.cc/H3XZ-V5NF] (discussing in depth the process of amending the FRCP).

[220] *See* Jack Starcher, Note, *Addressing What Isn't There: How District Courts Manage the Threat of Rule 68's Cost-Shifting Provision in the Context of Class Actions*, 114 COLUM. L. REV. 129, 130–31 (2014) (discussing how the conflict between FRCP 23 and 68 leads to the problem of picking off proposed class representatives with unaccepted settlement offers); Brandon T. McDonough, *Subject Matter Jurisdiction Peek-A-Boo: The Confusing State of Rule 68*, 70 BENCH & B. MINN. 19, 19 (2013) ("One does not need to dig too deep to discover that Rule 68 is not working for federal court litigation. The question is whether Rule 68 can be fixed. The answer is, probably not.").

[221] *See* Starcher, *supra* note 220, at 143–65. Starcher discusses the different approaches that district courts have taken to avoid picking off proposed class representatives with unaccepted offers: granting a motion to strike, refusing to strike the offer but declaring the offer to be without legal meaning, or refusing to take any action whatsoever. *See id.* at 143–57. He instead advocates for a fourth approach, as adopted in *Mey v. Monitronics International*: let the case proceed through class certification, and, if it survives, the offer will "disappear." *Id.* at 161 (quoting Mey v. Monitronics Int'l, No. 5:11CV90, 2012 WL 983766 at *5 (N.D.W. Va. Mar. 22, 2012)). If the case does not proceed to certification, the plaintiff is held to the requirements of FRCP 68(d), which requires offerees who obtain judgments that are more favorable than an unaccepted settlement offer to pay costs incurred after the offer. *Id.* He also recognizes that all approaches have flaws, including the one for which he advocates. *Id.* at 159 ("Each of these approaches leaves something to be desired.").

[222] *See* McDonough, *supra* note 220, at 19.

[223] *See* 28 U.S.C. §§ 2071–2077*; see also* U.S. COURTS, *supra* note 219.

68 can be done through one of two ways: (1) the traditional, but laborious, rulemaking process, which falls under the Supreme Court's jurisdiction, or, (2) through legislative action.[224] Considering the Supreme Court's failure to resolve the issue when it was presented in 2013, bypassing the courts and utilizing congressional action seems enticing.[225] The current gridlock in Congress has resulted in a significant slowdown in legislative action.[226] Nevertheless, the coalition of parties that would potentially benefit from this change, from environmentalists to small government conservatives, makes it both politically and legally attractive.[227]

A. An Unlikely Solution: The Supreme Court Favorably Resolves the Split

An easy remedy to the issue of mooting cases in collective litigation could emerge if the Supreme Court decides a case addressing the specific issue and ends, once and for all, the practice of unilateral mooting of collective cases with unaccepted settlement offers.[228] Considering, however, that the Court had this chance in 2013 with *Genesis Healthcare Corp. v. Symczyk* and decided to ignore the issue and publish a decision irrelevant to the issue of mooting, the Court is unlikely to come to a favorable resolution in the near future.[229]

The majority of the Court in *Genesis* did not decide the issue of mooting on its merits and instead held that the question was improperly brought

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[224] *See* 28 U.S.C. §§ 2071–2077 (2012); *see also* U.S. COURTS, *supra* note 219; *infra* Part III-B-1 (discussing the formal process for amending the Federal Rules of Civil Procedure).

[225] *See Genesis III*, 133 S. Ct. at 1534−35 (Kagan, J., dissenting) (stating that the issue of unilateral mooting of collective actions is "part and parcel of . . . the question Genesis presented for our review" yet the court does not resolve the issue).

[226] *See, e.g.*, Philip Bump, *It's a Holiday Miracle! The 113th Congress (Probably) Wasn't the Least Productive Ever!*, WASH. POST: THE FIX (Dec. 19, 2014), http://www.washingtonpost.com/blogs/the-fix/wp/2014/12/19/its-a-holiday-miracle-the-113th-probably-wasnt-the-least-productive-ever [perma.cc/JQN6-E4AY]. The 113th Congress passed the second fewest amount of legislation, excluding the naming of post offices, in history. *Id.* The only session that was less productive was the 112th Congress. *Id.*

[227] *See Genesis III*, 133 S. Ct. at 1533–35 (Kagan, J., dissenting); REPUBLICAN NAT'L CONVENTION, WE BELIEVE IN AMERICA: 2012 REPUBLICAN PLATFORM 13, 18, 27 (2012), https://www.gop.com/platform/ [perma.cc/NQX3-NG6W] [hereinafter GOP PLATFORM]; DEMOCRATIC NAT'L COMM., MOVING AMERICA FORWARD: 2012 DEMOCRATIC NATIONAL PLATFORM 9, 17, 20–21 (2012), https://www.democrats.org/party-platform [perma.cc/6BGE-VDD6] [hereinafter DEM PLATFORM] (highlighting policy achievements and goals that are important to groups that often use collective litigation, such as environmentalists, civil rights groups, and unions); Amanda Little, An Interview with Ron Paul About His Presidential Platform on Energy and the Environment, GRIST (Oct. 17, 2007), http://grist.org/article/paul1 [perma.cc/PUF6-3J3S] (discussing how class actions are used to enforce private property rights); YEAZELL, *supra* note 22, at 244.

[228] *See Genesis III*, 133 S. Ct. at 1528–29 (acknowledging the split among the circuits regarding the mooting of claims with unaccepted offers but refusing to resolve the split in specific case "because the issue is not properly before" the court); 1537 (Kagan, J., dissenting).

[229] *See id.* at 1534–35 (Kagan, J., dissenting).

before it.[230] The majority believed that the plaintiff, Symczyk, conceded the mooting of her individual claim in her brief to the Third Circuit Court of Appeals.[231] Supreme Court Justice Kagan, dissenting with the support of three of her colleagues, however, disagreed and passionately advocated against the unilateral mooting of collective cases with a settlement offer.[232] *Genesis*'s focus on the singular issue of whether an unaccepted settlement offer may moot a case was reinforced in oral argument, during which all three lawyers who argued the case—the U.S. Solicitor General and lawyers representing both Genesis and Symczyk—discussed an unaccepted settlement offer's ability to moot a claim.[233] Yet the choice of five members of the Court makes it unlikely that the Court in its current makeup will grant certiorari to hear a similar case in upcoming terms with the intention of resolving this issue.[234]

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[230] *See id.* at 1528–29 (majority opinion). Justice Thomas, writing for the majority, declared that the split was "not properly before [the Court]." *Id.*

[231] *See id.* This is despite the fact that Symczyk explicitly asked whether an unaccepted offer for a proposed representative should moot an FLSA collective action. *See* Brief for Appellant at 2, Symczyk v. Genesis Healthcare Corp., 656 F.3d 189 (3d Cir. 2011) *rev'd*, 133 S. Ct. 1523 (2013) (No. 10-3178), 2010 WL 4163160, at *2.

[232] *See Genesis III*, 133 S. Ct. at 1532–37 (Kagan, J., dissenting) ("An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect."). Justices Ginsberg, Breyer, and Sotomayor joined Justice Kagan's dissent. *Id.* at 1532.

[233] *See* Transcript of Oral Argument at 3, Symczyk v. Genesis Healthcare Corp., 133 S. Ct. 1523 (2014) (No. 11-1059). Ronald Mann, representing Genesis, stated that "if the person won't take yes for an answer, the Federal Court doesn't need anything further." *Id.* at 9–10. Neal Kumar Katyal, representing Symczyk, stated that the case is about "the question of whether a withdrawn Rule 68 offer could moot a case. It cannot . . . it is literally the question presented." *Id.* at 16 (Assistant to the Solicitor General Anthony A. Yang, for the United State as amicus curiae supporting Symczyk, stated that "[a] settlement offer does not moot a claim if it is not accepted"). The briefs for each of the parties reaffirmed the issue as well. *See* Brief for Respondent at i, Symczyk v. Genesis HealthCare Corp., 133 S. Ct. 26 (2014) (No. 11-1059) ("The question presented is: Did defendants' Rule 68 offer to Ms. Symczyk render the entire collective action moot . . . ?"); Petitioner for a Writ of Certiorari at i, Symczyk v. Genesis HealthCare Corp., 133 S. Ct. 26 (2014) (No. 11-1059) (stating the "question presented" as "[w]hether 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"); Brief for the United States as Amicus Curiae Supporting Respondent at i, Symczyk v. Genesis Healthcare Corp., 133 S. Ct. 26 (2014) (No. 11-1059) (stating the "question presented" as "[w]hether an action brought as a collective action under 29 U.S.C. 216(b) becomes moot when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's individual damage claims").

[234] *Genesis III*, 133 S. Ct. at 1537 (Kagan, J., dissenting). Chief Justice Roberts and Justices Scalia, Kennedy, and Alito all joined Justice Thomas's majority opinion. *See id.* at 1526 (majority opinion).

B. A Simple Solution with a Complex Path: Amending the Federal Rules of Civil Procedure

The simpler solution to the problematic approach of mooting collective cases with unaccepted settlement offers is a relatively straightforward amendment to FRCP 68.[235] FRCP 68 covers offers of judgment.[236] The rule includes a subsection concerning unaccepted offers, but it does not mention mootness at all.[237]

Courts that favor mooting have used FRCP 68 offers to show that the court lacks subject-matter jurisdiction for a plaintiff's case.[238] These courts consider this offer to determine whether there is a "justifiable case or controversy under Article III."[239] Explicitly detailing an unaccepted settlement offer's role in mooting cases in the rule could resolve this problem.[240] Amending FRCP 68(b) to allow FRCP 68 offers to be used for mooting cases only when the moving party has no good faith belief that the opposing party intends for the litigation to be collective will prevent courts from mooting collective cases with unaccepted settlement offers.[241]

Even though the language necessary for the FRCP amendment is simple, the process of amending a Federal Rule of Civil Procedure is far more complex.[242] The traditional rulemaking process takes a significant amount of time, and this specific amendment is unlikely to succeed in part because the Supreme Court must approve amendments to the Federal Rules.[243] A FRCP amendment may avoid Supreme Court review, however, if Congress amends the rule through the legislative process.[244] Congress has not passed much legislation recently, but considering the coalitions that could poten-

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[235] *See* FED. R. CIV. P. 68; *Genesis III*, 133 S. Ct. at 1536 (Kagan, J., dissenting) (discussing FRCP 68's role in the problematic approach of mooting collective cases).

[236] FED. R. CIV. P. 68.

[237] *Id.* at R. 68(b). FRCP 68(b) reads: "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." *Id.*

[238] *See* O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 574 (6th Cir. 2009) ("[A] Rule 68 offer can be used to show that the court lacks subject-matter jurisdiction.") (citing Greisz v. Household Bank, 176 F.3d 1012, 1015 (7th Cir. 1999)).

[239] *Id.*

[240] *See Genesis III*, 133 S. Ct. at 1536 (Kagan, J., dissenting) (noting FRCP 68's silence regarding allowing courts to "terminate a lawsuit without the plaintiff's consent" yet courts still do so if "only the plaintiff's obstinacy or madness prevents her from accepting total victory"); *O'Brien*, 575 F.3d at 574.

[241] *See Genesis III*, 133 S. Ct. at 1536 (Kagan, J., dissenting); *O'Brien*, 575 F.3d at 574.

[242] *See* 28 U.S.C. §§ 2071−2077 (2012); *see also* U.S. COURTS, *supra* note 219.

[243] *See* 28 U.S.C. §§ 2072, 2074−2077 (detailing how the Supreme Court has the authority to prescribe federal rules and must transmit proposed amendments to Congress); U.S. COURTS, *supra* note 219 (stating that successful amendments to the FRCP require Supreme Court approval).

[244] *See* 28 U.S.C. § 2071(a) (all court-made rules such as the Federal Rules must be consistent with legislative acts).

tially support ending the practice of mooting proposed class representatives' claims, the amendment may be the type of political winner that Congress could support.[245]

1. Path One: The Traditional Rulemaking Process is Unlikely to Succeed

A change to the Federal Rules could be accomplished through the traditional rulemaking process.[246] The lengthy procedure requires a minimum of seven stages of formal comment and review, lasting usually two to three years total for suggestions to be properly implemented into the rules.[247] A suggestion for a rule change goes through several advisory committees assisting the Committee on Rules of Practice and Procedure of the Judicial Conference, which is made up of federal judges, practicing lawyers, law professors, state supreme court chief justices, and representatives from the federal Department of Justice.[248] Suggestions must also go through several public hearings and a comment period, and they require approval from both the Supreme Court and Congress.[249]

The Judicial Conference is statutorily required to "continuous[ly] study the operation and effect of the general rules of practice and procedure."[250] Pursuant to this requirement, the Judicial Conference must focus on several factors, including fairness in administration, just determination

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[245] *See id.*; Bump, *supra* note 226; GOP PLATFORM, *supra* note 227, at 27 (advocating for the necessity of enforcing private property rights); DEM PLATFORM, *supra* note 227, at 9, 17, 20–21 (highlighting policy achievements and goals important to groups that use collective action to achieve their goals, such as environmentalists, civil rights groups, and unions); Little, *supra* note 227 (Republican leader discussing that class actions enforce private property rights); YEAZELL, *supra* note 22, at 244. The 113th Congress passed the second fewest amount of legislation, excluding the naming of post offices, in history. Bump, *supra* note 226. The only session that was less productive was the 112th Congress. Bump, *supra* note 226.

[246] *See* 28 U.S.C. §§ 2072, 2074–2077; U.S. COURTS, *supra* note 219, at 1–6 (discussing the procedure for how the Federal Rules are amended).

[247] U.S. COURTS, *supra* note 219, at 2. Anyone may make a suggestion for an amendment to the rules. *See id.*

[248] *See id.* at 3–4. The authority for the Judicial Conference and its Committee on Rules of Practice and Procedure and the procedure for promulgating federal civil procedure rules were created by Congress in the Rules Enabling Act. *Id.* at 1; *see* 28 U.S.C. §§ 2071–2077. The Committee on Rules of Practice and Procedure is often referred to as the Standing Committee. U.S. COURTS, *supra* note 219, at 1. The Standing Committee coordinates proposed amendments "as may be necessary to maintain consistency and otherwise promote the interests of justice." U.S. COURTS, *supra* note 219, at 1 (quoting 28 U.S.C. § 2073(b)).

[249] *See* U.S. COURTS, *supra* note 219, at 2–6. The Supreme Court has the authority to prescribe the federal rules during a statutorily required waiting period. *See id.* at 5 (citing 28 U.S.C. §§ 2072, 2075). Congress is the final step in the process and has seven months to act before rules prescribed by the Supreme Court automatically take effect. *See id.* (citing 28 U.S.C. §§ 2074–75).

[250] *Id.* at 1; *see* 28 U.S.C. § 331 (2008).

of litigation, and the elimination of unjustifiable expense and delay.[251] There have been a number of amendments since the original rules were written in 1937.[252] Amendments have been issued even during the modern era of hyper-partisanship.[253]

The proposed change to FRCP 68 that would lead to the elimination of unilateral mooting of collective action before a class certification motion is aligned with the Judicial Conference's congressionally-required considerations.[254] Binding all class members to the same result, positive or adverse, helps ensure fair administration of justice.[255] Thus, picking off a class representative with an offer for full recovery and forcing every class member to bring his or her own individual suit is not just determination of litigation.[256] If every potential class member were forced to bring each case individually, this would create significant unjustifiable expense and a delay in justice for each member of the class, the defendant, and any party looking to the court for resolution of a dispute.[257]

The proposed change to the Federal Rules may accomplish what Congress desired of the Judicial Conference, but because the procedure requires the Supreme Court's approval, any amendment favoring the elimination of

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[251] 28 U.S.C. § 331; *see* U.S. COURTS, *supra* note 219, at 1. Other factors include simplicity of procedure. 28 U.S.C. § 331; *see* U.S. COURTS, *supra* note 219, at 1.

[252] *See Federal Rules of Civil Procedure: Historical Note*, CORNELL UNIV. LAW SCH. LEGAL INFO. INST., http://www.law.cornell.edu/rules/frcp#Form_6_1_target [perma.cc/N8JL-558G].

[253] *See id*.; Bump, *supra* note 226. The FRCP have been amended eight times since the Obama Administration began. *See* CORNELL UNIV. LAW SCH. LEGAL INFO. INST., *supra* note 252.

[254] *See* 28 U.S.C. § 331 (detailing the congressionally desired goals for the FRCP and Judicial Conference); RUBENSTEIN, *supra* note 8, §§ 1:7–10 (detailing the policy benefits of class actions as efficiency, compensation, deterrence, and legitimacy).

[255] *See* 28 U.S.C. § 331 (desiring changes in FRCP to increase "fairness in administration"); *Weiss*, 385 F.3d at 344 ("Allowing the defendants here to 'pick off' a representative plaintiff with an offer of judgment less than two months after the complaint is filed may undercut the viability of the class action procedure and frustrate the objectives of this procedural mechanism for aggregating small claims."); RUBENSTEIN, *supra* note 8, § 1:3 (stating that FRCP 23 allows for class actions specifically in cases in which the defendant has limited funds in order to ensure that all class members can receive at least partial recovery). Various collective actions have different procedures for determining who can be bound by the result of a collective litigation. *Compare* FED. R. CIV. P. 23 (stating that class actions bind all members of the class), *with* 29 U.S.C. § 216(b) (stating that collective FLSA claims do not bind similarly situated workers who do not opt into the class).

[256] *See* 28 U.S.C. § 331 (desiring changes in the Federal Rules to increase "just determination of litigation, and the elimination of unjustifiable expense and delay"); *Weiss*, 385 F.3d at 344; RUBENSTEIN, *supra* note 8, § 1:9 (detailing how collective actions increase efficiency through consolidation of similar claims, saving costs for all litigants, absent class members, and especially courts, as a single class action is a much easier process than a number of individual claims; discussing how collective actions prevent problematic inconsistent results that may arise when similar cases are handled separately).

[257] *See* 28 U.S.C. § 331; *Weiss*, 385 F.3d at 344; RUBENSTEIN, *supra* note 8, § 1:9.

the mooting doctrine is likely to face opposition from the Justices.[258] As noted above, the Supreme Court had the opportunity to end this practice in *Genesis*.[259] The majority's decision to avoid resolving the issue shows that at least five members of the Court do not want to address the mooting doctrine at this time, making it unlikely that the Court in its current makeup would approve an amendment similar to the one suggested herein.[260]

2. Path Two: Congressional Action: Potentially Difficult but Politically Attractive

Congress has the power to amend the FRCP unilaterally through the legislative process.[261] Any potential change to a law is made more promising by the coalitions of parties and interest groups likely willing to lobby for and support its passage.[262] The previously suggested amendment to the Federal Rules could garner support from powerful groups within both major political parties, making it politically attractive.[263]

Although some critics of legislative action regarding court rules prefer that judges and practicing attorneys exclusively manage the rulemaking process for the Federal Rules because they inherently have more legal expertise, the Federal Rules have been and continue to be influenced by the

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[258] *See* 28 U.S.C. § 331 (2008) (describing the Supreme Court's role in approving amendments to the FRCP); *Genesis III*, 133 S. Ct. at 1536−37 (Kagan, J., dissenting) (criticizing the majority for having the opportunity to resolve the circuit split to end the practice of mooting collective actions with unaccepted settlement offers, but choosing to do something that "aids no one, now or ever"); U.S. COURTS, *supra* note 219, at 5.

[259] *See Genesis III*, 133 S. Ct. at 1536−37 (Kagan, J., dissenting).

[260] *See id.*

[261] *See* SUBRIN ET AL., CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 7 (4th ed. 2012).

[262] *See, e.g.*, JEFFREY H. BIRNBAUM & ALAN S. MURRAY, SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM 284–87 (1987) (detailing how a strange coalition of Republicans, Democrats, and interest groups came together to pass major tax reform in 1986); Press Release, U.S. Senate Democrats, Public Interest Groups Voice Support for Senate Health Insurance Proposal, Continuing Momentum for Reform (Nov. 20, 2009), http://democrats.senate.gov/2009/11/20/public-interest-groups-voice-support-for-senate-health-insurance-proposal-continuing-momentum-for-reform/#.VOOhwVPF9DU [perma.cc/2N47-TQ8C] (showing the numerous and various interest groups supporting health care reform in 2009, including the American Association for Retired Persons, NAACP, Health Care for America Now, Service Employees International Union, American Federation of Labor and Congress of Industrial Organizations, Center for Budget and Policy Priorities, National Women's Law Center, and Doctors for America).

[263] *See* YEAZELL, *supra* note 22, at 244; Little, *supra* note 227 (Republican presidential candidate and ideological leader discussing how class actions effectively enforce private property rights); GOP PLATFORM, *supra* note 227, at 27 (Republican platform advocating the necessity of enforcing private property rights); DEM PLATFORM, *supra* note 227, at 9, 17, 20–21 (highlighting policy goals important to groups that use collective actions to achieve their goals such as environmentalists, civil rights groups, and unions).

political current of the day.[264] Unfortunately, the recent political climate shows Congress's inertia is resting on inaction rather than massive policy changes.[265] Legislative unproductivity is a result of a variety of factors.[266] Regardless of the reason, few believe Congress will be significantly more productive in the foreseeable future.[267]

Legislative change generally requires a coalition of party actors and interest groups willing to lobby for and support its passage.[268] The suggested amendment to FRCP 68 could garner support from powerful groups within both major political parties, making it politically attractive.[269] Although the passage of any bill remains an uphill battle in the modern political culture, the groups benefitting from the existence of, and supporting the use of, collective actions play a key role within both major political parties, making the FRCP 68 amendment potentially a political winner.[270]

Interest groups critical to the Democratic Party's success greatly benefit from collective action suits.[271] Environmentalists, civil rights activists, and workers' rights advocates, including unions, have all played a significant role in the success of the modern Democratic Party.[272] The importance

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[264] *See* SUBRIN ET AL., *supra* note 261, at 317−18 (detailing how politics has affected civil procedure from the Common Law and the Field Code to the modern day); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 459−60 (1993).

[265] *See, e.g.*, Charles Babington, *Why Congress Is So Dysfunctional*, HUFFPOST POLITICS, (Oct. 2, 2011, 10:15 AM), http://www.huffingtonpost.com/2011/10/02/congress-dysfunction-long_n_991010.html [perma.cc/Z75P-N5JZ].

[266] *See id*. (listing increased partisanship by legislators, fewer centrists in Congress, political realignment, cultural shifts, influxes of money exaggerating partisanship, and extremism among primary voters as reasons for Congress's dysfunction).

[267] *See* Chris Cillizza & Paul Kane, *Think the 113th Congress Was Bad? Just Wait*, WASH. POST: THE FIX (Sept. 25, 2014), http://www.washingtonpost.com/blogs/the-fix/wp/2014/09/25/think-the-113th-congress-was-bad-just-wait [perma.cc/5VZM-3F2J] (describing how the 114th Congress will be just as unproductive as the 113th, if not less productive, partially because of the constant focus on the next election).

[268] *See supra* note 262 and accompanying text.

[269] *See* GOP PLATFORM, *supra* note 227, at 27; DEM PLATFORM, *supra* note 227, at 9, 17, 20–21; Little, *supra* note 227; YEAZELL, *supra* note 22, at 244.

[270] *See* Cillizza & Kane, *supra* note 267 (noting that the 113th Congress has passed few bills and will likely maintain this pace); *see also supra* note 227 and accompanying text.

[271] *See* HENSLER ET AL., *supra* note 98, at 71−72; Press Release, Cmty. Envtl. Legal Def. Fund, *supra* note 101 (environmentalists using collective action to achieve goals); Press Release, Am. Civil Liberties Union, *supra* note 101 (ACLU and NAACP using collective action to fight social wrongs); DEM PLATFORM, *supra* note 227, at 9, 17, 20−21 (highlighting policy achievements and goals important to environmentalists, civil rights groups, and unions).

[272] *See, e.g.*, *Environment: Long Term Contribution Trends*, OPEN SECRETS, http://www.opensecrets.org/industries/totals.php?ind=Q11++ [perma.cc/9TUE-3KM9] (showing that environmentalists give millions of dollars in direct political contributions, with ninety-one percent of funds directed to Democrats); *Labor: Top Contributors to Federal Candidates, Parties and Outside Groups*, OPEN SECRETS, https://www.opensecrets.org/industries/contrib.php?cycle=2014&ind=P [perma.cc/AQ5U-CCL7] (showing that eighty-nine percent of the labor unions' political contributions went to Democratic candidates); *American Civil Liberties Union: Profile for 2012 Election*, OPEN SE-

of these groups is so critical to the Democratic Party that the party has cemented many of these groups' core issues within the party platform.[273] Environmentalists, civil rights advocates, and workers' rights advocates all benefit from collective action by litigating massive suits against various bad actors such as polluters and employers violating federal law.[274] The mooting of class representatives' claims in collective litigation has already weakened these groups' efforts to promote justice, making these groups and their congressional Democratic allies more likely to support the FRCP amendment.[275]

The suggested Federal Rules amendment is also philosophically consistent with the modern Republican ideology.[276] In recent years, the Republican Party has concentrated on reducing government spending and minimizing intrusion into individuals' lives.[277] With this more libertarian tilt, the Republican Party has achieved budget cuts in almost every area of government, including law enforcement.[278] This has included efforts to eliminate the government from the private intricacies of individuals' lives as much as possible, even in areas typically deemed appropriate for government inter-

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CRETS, https://www.opensecrets.org/orgs/summary.php?id=D000031473&cycle=2012 [perma.cc/DF7Z-J5BS] (donating to only Democrats, including President Obama's reelection and the Democratic National Committee).

[273] *See* DEM PLATFORM, *supra* note 227, at 9, 17, 20–21. The Democratic Platform specifically includes a section called "Standing Up for Workers," which advocates for labor laws and support for workers while attacking the opposition for its focus on "undermining unions." *See id.* at 9. The Democratic Platform also has a section on the environment, arguing for a stronger fight against climate change, restoration of landscapes, and reducing pollution while attacking the Republican Party for doubting the science of climate change. *See id.* at 20–21. There is also a section called "Civil Rights" detailing Democratic action in support of anti-discrimination statutes in both legislative and executive branches. *See id.* at 17.

[274] *See Genesis III*, 133 S. Ct. at 1527, 1532; *O'Brien,* 575 F.3d at 572; HENSLER ET AL., *supra* note 98, at 71–72; Press Release, Cmty. Envtl. Legal Def. Fund, *supra* note 101; Press Release, Am. Civil Liberties Union, *supra* note 101.

[275] *See supra* notes 227 and 271 and accompanying text.

[276] *See* James Hohmann, *Poll: Republicans Embracing Libertarian Priorities*, POLITICO (Sept. 11, 2013, 5:14 AM), http://www.politico.com/story/2013/09/poll-republicans-libertarian-96576.html [perma.cc/LDG3-V69T]; GOP PLATFORM, *supra* note 27, at 27 (asserting that communities need a "legal system . . . [that] must provide stability and protect property rights"); Little, *supra* note 227.

[277] *See* Hohmann, *supra* note 276 (analyzing poll data showing that seventy-eight percent of Republicans and Republican-leaning independent voters self-identify as fiscally conservative and socially moderate, and highlighting that the top priority of Republican voters is "individual freedom through lower taxes and reducing the size and scope of government").

[278] *See* GOP PLATFORM, *supra* note 227, at 3 (asserting that the Republican Party stands for "reining in out-of-control spending"); Yost, *supra* note 175, at 1 (detailing how the Department of Justice was handling the $1.6 billion cut in funding); Hicks, *supra* note 175, at 1 (describing the potential furloughs that faced the EEOC as a result of a five percent budget cut); Losey, *supra* note 175, at 1 (describing that the Department of Labor furloughed 4700 employees, or twenty-eight percent, of its workforce as a result of the 2013 federal budget cuts).

vention.[279] At the same time, Republicans have strong convictions regarding private property rights, ingraining them into their party platform.[280] Even the most strident libertarians, who tolerate only minimal government intervention, recognize the need for courts to protect these property rights.[281] For the modern Republican Party that advocates for protecting property rights, it logically flows to simultaneously uphold and support collective actions, which allow citizens to more effectively enforce property rights.[282] This property right enforcement is also accomplished in a Republican-friendly and cost effective manner by relying on a private attorney general rather than a governmental agency to ensure the rights are protected.[283]

Notwithstanding the fact that correcting this issue of application of the mooting doctrine is aligned with the philosophies and interests of both parties, the implementation of this recommended solution, however, still faces an uphill battle.[284] Congress often struggles to resolve major issues, choos-

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[279] *See* Colby Itkowitz, *Senator Says Restaurant Employees Shouldn't Be Required to Wash Their Hands*, WASH. POST (Feb. 3, 2015, 5:30 PM), http://www.washingtonpost.com/blogs/in-the-loop/wp/2015/02/03/the-next-public-health-debate-hand-washing [perma.cc/TU8D-C8TK] (detailing how a Republican senator advocated in favor of eliminating the government regulation requiring restaurant workers to wash their hands); Philip Rucker & Rosalind S. Helderman, *Vaccination Debate Flares in GOP Presidential Race, Alarming Medical Experts*, WASH. POST (Feb. 2, 2015), http://www.washingtonpost.com/politics/chris-christie-remarks-show-vaccines-potency-in-political-debate/2015/02/02/f1c49a6e-aaff-11e4-abe8-e1ef60ca26de_story.html [perma.cc/X7TQ-PZ8M] (publishing comments from two Republican presidential candidates in 2015 opposing government mandates for vaccinations).

[280] *See* GOP PLATFORM, *supra* note 227, at 13, 18, 27. The GOP Platform argued for property rights in several contexts, including arguing for the protection of private property in response to *Kelo v. New London*, which strengthened the public sector's ability to use eminent domain, advocating that conservation must be balanced with private property rights and that the most economically advanced countries "respect and protect private property rights," and asserting that all communities "must provide stability and protect property rights," especially to protect "the most vulnerable: children, women, and elders." *Id.*

[281] *See id.* at 27; Little, *supra* note 227 (detailing his ideal environmental plan that involves no government beyond courts enforcing property rights); JONATHAN WOLFF, ROBERT NOZICK: PROPERTY, JUSTICE, AND THE MINIMAL STATE 10−11 (1991) (detailing how libertarian philosopher Nozick endorses a minimalist state that only "protects against force, fraud, and theft, and enforces contract").

[282] *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974); GOP PLATFORM, *supra* note 227, at i (advocating for the reduction in government as a core principle), 13 (emphasizing protecting private property in the context of opposing *Kelo v. New London*), 27 (asserting that all communities need a "legal system . . . [to] provide stability and protect property rights"); Little, *supra* note 227 (detailing an ideal environmental plan that uses no government beyond courts using class-actions as a mechanism to ensure that property rights are enforced).

[283] *See* RUBENSTEIN, *supra* note 8, § 1:8; Little, *supra* note 227 (detailing preference that private individuals enforce property rights using class actions because this method uses no government beyond the courts); Coffee, *supra* note 87, at 215−19.

[284] *See* Cillizza & Kane, *supra* note 267 (asserting that Congress will remain unproductive in the foreseeable future); Babington, *supra* note 265 (explaining the many reasons Congress passes so few bills, including fierce partisanship, more ideological polarization in both Congress and congressional districts, cultural shifts, and money's larger role in the political process).

ing bandages when legislative surgery is needed, even when deadlines with significant consequences are looming.[285] The biggest roadblocks for this solution are the parties that benefit from maintaining the mooting of collective actions, including wealthy corporate defendants facing repeated lawsuits.[286] With the power of money in politics at an all-time high, yet concentrated in only a few hands, the wealthy may have the spending ability to prevent any reform that may save collective litigation, even if the reform is popular within both parties.[287] Without collective action, many of the wrongs wealthy corporate defendants commit, from blatantly illegal discrimination to world-altering oil spills, will go inadequately punished and the victims will go uncompensated.[288]

CONCLUSION

"Corporate profits are at their highest level in at least 85 years. Employee compensation is at the lowest level in 65 years."[289] An April 2014 *New York Times* article led with this quote and continued by describing how corporate profits have increased over the past decades at the expense of the corporate tax rate and employee compensation rate, both of which fell sig-

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[285] *See* Dylan Matthews, *The Sequester: Absolutely Everything You Could Possibly Need to Know, in One FAQ*, WASH. POST (Feb. 20, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/02/20/the-sequester-absolutely-everything-you-could-possibly-need-to-know-in-one-faq [perma.cc/ES2R-A88B] (detailing how sweeping federal budget cuts were implemented after the 2011 "Super Committee" on Deficit Reduction failed to reach a deal by deadline); Josh Levs, *Fiscal Cliff Deal: 5 Things to Know,* CNN (Jan. 2, 2013 12:22 PM), http://www.cnn.com/2013/01/02/politics/fiscal-cliff-5-things [perma.cc/B4RP-KTT3] (discussing how recent fiscal cliffs "kick[] the can, and three more fiscal cliffs are looming"); Binyamin Appelbaum & Eric Dash, *S.&P. Downgrades Debt Rating of U.S. for the First Time*, N.Y. TIMES (Aug. 5, 2011), http://www.nytimes.com/2011/08/06/business/us-debt-downgraded-by-sp.html [perma.cc/ZQJ8-UVRP] (noting that Standard and Poor downgraded the federal debt due to political gridlock and the difficulty Congress has faced in raising the federal debt ceiling).

[286] *See* Diaz v. First Am. Home Buyers Prot. Corp., 732 F.3d 948, 950 (9th Cir. 2013) (describing how defendant, a national insurance company, sought to moot the proposed representative's claim); McCauley v. Trans Union*,* 402 F.3d 340, 340 (2d Cir. 2005) (highlighting that the defendant moving to moot the proposed representative's claim was a major credit reporting agency working for Sallie Mae); Weiss v. Regal Collection, 385 F.3d 337, 339 (3d Cir. 2004) (summarizing how defendant, a major debt collector for Citibank, moved to moot the proposed representative's claim).

[287] *See* Russ Choma, *Final Tally: 2014's Midterm Was Most Expensive, with Fewer Donors*, OPEN SECRETS (Feb. 18. 2015), http://www.opensecrets.org/news/2015/02/final-tally-2014s-midterm-was-most-expensive-with-fewer-donors [perma.cc/FT4A-TRXN] (asserting that the 2014 midterm election was the most expensive midterm election in history, but for the first time since 1990, fewer Americans donated than the previous midterms, meaning fewer people are donating more).

[288] *See In re Deepwater Horizon*, 732 F.3d 326, 326 (5th Cir. 2013); Dorrian, *supra* note 104.

[289] Floyd Norris, *Corporate Profits Grow and Wages Slide*, N.Y. TIMES (Apr. 4, 2014), http://www.nytimes.com/2014/04/05/business/economy/corporate-profits-grow-ever-larger-as-slice-of-economy-as-wages-slide.html [perma.cc/84G7-3XK8].

nificantly.[290] Highlighting a variety of data, the article demonstrated how the powerful in Washington, D.C. have effectively served corporate interests and glossed over the concerns of middle class America. Unfortunately, this is not a new trend.

The issue of mooting a class representative's claim with an unaccepted offer prior to a class certification motion may be another example of corporate interests triumphing over those of individual Americans. Historically, collective actions have served as a method for individuals to band together to create an even playing field against a strong, unified corporate defendant. The proliferation of the practice of mooting cases strikes at this equalizing tool and allows the powerful to succeed without merit. Beyond the tremendous societal benefits, there are significant political benefits in making the suggested change to the application of the mootness doctrine. Undercutting collective action leaves victims uncompensated and corporate wrongdoers enriched. This should not continue.

There are several paths to avoid this danger. The Supreme Court could decide a case that brings this question in front of the Court in a manner that satisfies the conservative wing of the court, but after the Court's refusal to do so in *Genesis,* there is no reason to think a majority would address the issue. A proposed amendment to the FRCP could pass through the traditional rulemaking process that includes the Supreme Court's input, making that route for this change murkier than the usual proposed amendment. The final option for this fix relies on Congress. Given the various coalitions that lead Congress to action or inaction, this path has some hope of success. When considering the influence that wealthy interests have in shaping our legal system, however, this issue may be another pawn lost in the game of justice.

[290] *See id.* The employee compensation rate looked at employee compensation as a percentage of Gross Domestic Product. *Id.*