No. 14-857

IN THE

Supreme Court of the United States

CAMPBELL-EWALD COMPANY,

Petitioner,

v.

JOSE GOMEZ,

Respondent.

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

RESPONDENT'S SUPPLEMENTAL BRIEF

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ARGUMENT

Respondent submits this supplemental brief to advise the Court of developments that may affect the Court's consideration of the first and second questions presented in Campbell-Ewald's petition, concerning whether an unaccepted offer of judgment for individual relief to the named plaintiff in a putative class action eliminates any justiciable case or controversy presented by the action.

On April 9, 2015, the Advisory Committee on Civil Rules met in Washington, D.C., to discuss possible amendments to the Federal Rules of Civil Procedure, including Rule 23. The Advisory Committee's Rule 23 Subcommittee reported that it is considering a number of proposals affecting Rule 23, including proposals that would (1) provide that a tender of relief to a class representative can result in termination of a class action only if the district court has already denied class certification; (2) prohibit Rule 68 offers of judgment in actions invoking Rule 23 (both pre- and post-certification); and/or (3) require judicial approval of pre-certification individual settlements of actions filed as Rule 23 class actions.[1]

The Advisory Committee's consideration of rules changes that would affect the issues raised by the pe-

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[1] The alternatives being considered by the Rule 23 Subcommittee are set forth in the Advisory Committee's Agenda Book for the meeting, which is available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2015-04.pdf. The Rule 23 Subcommittee Report begins on p. 243 of the Agenda Book, and also has its own page numbers. The description of the alternatives the Subcommittee has suggested with respect to offers of judgment is found at pp. 277–80 of the Agenda Book (pp. 35–38 of the Subcommittee Report).

tition for certiorari, and that collectively are aimed at preventing potential class actions from being scuttled by offers aimed at "picking off" the named plaintiffs, is another reason for this Court to decline Campbell-Ewald's invitation to step into these issues now. The rulemaking process is likely to be an effective way of ensuring uniformity of practice among the circuits. Moreover, to the extent that Campbell-Ewald argues that policy considerations favor allowing defendants to avoid class actions through pick-off offers to individual plaintiffs (*see* Pet. 2, 27–29), the rulemaking process is likely to be a superior way of considering and resolving the competing policy arguments that bear on the question. As this Court has recognized, "the rulemaking process has important virtues. It draws on the collective experience of bench and bar, ... and it facilitates the adoption of measured, practical solutions." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 114 (2009); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

Just as the appellate courts are only beginning to address these issues in light of *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), the rulemaking process has also only recently gotten underway. The Court should allow both the appellate and rulemaking processes to proceed, as the outcome of one or the other (or both) is likely either to obviate any need for review by this Court or, if review ultimately becomes necessary, to better inform that review.

Of course, the rulemaking process does not directly resolve legal issues that go to the existence of Article III jurisdiction. But by establishing the procedural consequences of particular actions taken by the parties—such as the defendant's proffering of an offer

and the plaintiff's declining to accept it—the rules can both frame and affect the outcome of jurisdictional disputes. *See, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999). Justice Kagan's discussion of the supposed mootness consequences of Rule 68 offers in her *Genesis* dissent illustrates the point. *See* 133 S. Ct. at 1534 (pointing out that Rule 68(b)'s provision that unaccepted offers are "considered withdrawn" is inconsistent with the position that such offers moot a plaintiff's claims).

Likewise, the alternatives under consideration by the Advisory Committee would affect resolution of the mootness arguments Campbell-Ewald advances by making clear that the rules do not authorize the termination of a prospective class representative's individual claim through entry of judgment or dismissal based on an offer of complete individual relief. The proposals would thus foreclose the argument that the individual plaintiff's case is "over" or that he has "won" merely by having received an offer and that he therefore can no longer pursue class certification because he has no remaining case or controversy with the defendant.

Such rules would greatly reduce the likelihood that divergences in practice among the circuits would develop or persist in the wake of *Genesis*. Should a federal appellate court nonetheless, at some future date, rule that an offer of individual relief moots a plaintiff's ability to pursue a class action—and there has as yet been no such ruling since *Genesis*—this Court could then determine whether review was required. But for the present, this Court should stay its hand in light of the ongoing consideration of these issues by the Advisory Committee and the appellate courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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