No. 14-857

IN THE

Supreme Court of the United States

CAMPBELL-EWALD COMPANY,
Petitioner,

v.

JOSE GOMEZ,
Respondent.

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

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text, history, and values, and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1991, Congress enacted the Telephone Consumer Protection Act ("TCPA") in response to "consumer[] . . . outrage[] over the proliferation of intrusive, nuisance calls to their homes from telemarketers." Pub. L. No. 102-243, sec. 2(6), 105 Stat. 2394 (codified at 47 U.S.C. § 227 (2010)). Concluding that "automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call," *id.* sec. 2(13), Congress imposed limits on such calls. Among other things, Congress prohibited the use of automatic telephone dialing systems to make calls to cellular phones except in emergencies or with the pri-

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

or express consent of the called party. 47 U.S.C. § 227(b)(1)(A)(iii).

Notwithstanding those legal prohibitions, Campbell-Ewald Company ("Campbell-Ewald"), a marketing consultant, caused text messages (which undisputedly constitute "call[s]" within the meaning of the TCPA for purposes of this lawsuit) to be sent using automated dialing equipment to the cell phones of roughly 100,000 people who had not consented to receive those messages. Respondent Jose Gomez was one of those roughly 100,000 people and sued Campbell-Ewald on behalf of a proposed class of recipients of the unauthorized texts. Before the time for filing a motion for class certification had lapsed, Campbell-Ewald served Gomez with an offer of judgment under Federal Rule of Civil Procedure 68. Gomez moved to quash and strike the offer of judgment and moved for class certification as soon as permitted under the district court's local rules.

Even though Gomez did not accept the offer of judgment, and even though he was seeking to represent a class of similarly situated recipients of these unwanted text messages, Campbell-Ewald now argues that its unilateral decision to make an offer of judgment to Gomez as an individual not only moots Gomez's individual claims, but also his class claims. This is plainly wrong. As Gomez demonstrates in his brief, an offer of judgment that a plaintiff does not accept does not moot the plaintiff's individual claims because those claims remain unsatisfied, which means a court could provide an effectual remedy. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1533-34 (2013) (Kagan, J., dissenting) ("the recipient's rejection of an offer 'leaves the matter as if no offer had ever been made,'" which means that after the offer expired, "[the plaintiff's] individual stake in

the lawsuit thus remained what it had always been, and ditto the court's capacity to grant her relief" (quoting *Minneapolis & St. L. Ry. Co. v. Columbus Rolling-Mill Co.*, 119 U.S. 149, 151 (1886))); *see* Resp't Br. 27-31. This argument is itself sufficient to resolve this case in Gomez's favor.

But even if Gomez's individual claims were mooted by the unaccepted offer (which again they were not), the federal courts would still have jurisdiction to consider his class claims. Campbell-Ewald's arguments to the contrary fundamentally misunderstand the role of the federal courts in our constitutional system and the critical role Rule 23 class actions play in facilitating that role.

When the Framers drafted our enduring Constitution, their design sharply departed from the precursor Articles of Confederation in several respects. Most relevant here, the Framers created the judiciary as an independent, co-equal branch of government, vesting the newly-created federal courts with the "judicial power" to resolve nine categories of cases and controversies. By vesting this broad power in the judicial branch, the Framers sought to ensure that the federal courts would have the power to protect individual rights secured by federal law.

The provision of this power in the federal courts reflected the Framers' firmly held belief that where there is a legal right, there is also a legal remedy. Indeed, the Framers, who were steeped in English common law traditions, recognized that legal rights were meaningless without the right to go into court to obtain a remedy. As this Court recognized in *Marbury v. Madison*, "'[i]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'" 5 U.S. (1 Cranch.) 137, 163 (1803)

(quoting 3 William Blackstone, *Commentaries on the Laws of England* *23).

Federal Rule of Civil Procedure 23, which permits a representative party to sue on behalf of a class of similarly situated claimants where certain specified conditions are met, was designed, in part, to help effectuate the Framers' vision of the role Article III courts would play in our constitutional system. Rule 23 was originally adopted to codify a longstanding rule of equity that allowed for aggregate actions where the question was one of interest to too many people to allow them all to be brought before the court at the same time. But the Rule's Framers also wanted injured parties to be able to seek redress in the federal courts even when their claims were too small to make individual litigation economically feasible. Thus, the Rule was amended in 1966 to "create a procedural vehicle capable of . . . 'enabling small people with small claims to vindicate their rights when they could not otherwise do so.'" John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 Miss. C. L. Rev. 323, 336-37 (2005) (quoting Memorandum from the Advisory Committee on Civil Rules to the Chairman and Members of the Standing Committee on Practice and Procedure of the Judicial Conference of the United States, Summary Statement of the Civil Rules Amendments Recommended for Adoption 7 (June 10, 1965)).

In this way, Rule 23 helps realize the Framers' vision for the federal courts: the Framers believed that where there is a legal right, there is a legal remedy; and Rule 23 ensures that similarly injured parties can seek that legal remedy in the federal courts even when their injuries are too small to make individual lawsuits feasible. It would fundamentally undermine both Rule 23 and Article III to hold that

class claims are mooted simply because the defendant has made an unaccepted offer to resolve the plaintiff's individual claims.

Indeed, this Court's precedents underscore the importance of the Rule 23 class action in ensuring that there is legal redress for injured parties. As the Court explained in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Deposit Guar. Nat'l Bank*, 445 U.S. at 339. Thus, in that case, the Court held that the named plaintiffs had Article III standing to appeal the denial of class certification even after they were offered the amounts claimed in their individual capacities and judgment was entered in their favor on that basis. In *U.S. Parole Commission v. Geraghty*, 445 U.S. 388 (1980), this Court reached essentially the same conclusion, holding that the denial of a motion for class certification may be reviewed on appeal even after the named plaintiff's personal claim has become "moot." According to the Court, the "elements [that make a dispute capable of judicial resolution] can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired." *Geraghty*, 445 U.S. at 403. Indeed, allowing a plaintiff to pursue class claims even after his individual claims have expired (which, again, is not the case here) furthers, rather than undermines, Article III values. Accordingly, the judgment of the court of appeals should be affirmed.

ARGUMENT

THIS COURT SHOULD HOLD THAT AN UNACCEPTED OFFER OF JUDGMENT CANNOT MOOT CLASS CLAIMS EVEN WHEN THE CLASS HAS NOT YET BEEN CERTIFIED

A. Allowing an Unaccepted Offer To Moot Class Claims Would Undermine One of Article III's Fundamental Purposes, Which Is To Ensure That Where There Is a Legal Right, There Is a Legal Remedy

1. The Framers Wrote Article III To Ensure That Where There Is a Legal Right, There Is a Remedy for Infringement of that Right

Article III of the Constitution broadly extends the "judicial Power" to nine categories of cases and controversies, including "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." U.S. Const. art. III, § 2, cl. 1. Article III's plain language empowers the "judicial department" to "decide all cases of every description, arising under the constitution or laws of the United States," extending to the federal courts the obligation "of deciding every judicial question which grows out of the constitution and laws." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 382, 384 (1821).

The Constitution's sweeping grant of judicial power to the newly created federal courts was a direct response to the infirmities of the Articles of Confederation, which established a single branch of the federal government and no independent court system. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1443 (1987) (explaining that

Confederation courts were "pitiful creatures of Congress, dependent on its pleasure for their place, tenure, salary, and power"). Under the dysfunctional government established by the Articles of Confederation, individuals could not go to court to enforce federal legal protections, prompting Alexander Hamilton to observe that, "[l]aws are a dead letter without courts to expound and define their true meaning and operation." *The Federalist No. 22*, at 118 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The result, Madison explained, was that "acts of Cong[ress] . . . . depend[ed] for their execution on the will of the state legislatures," making federal laws "nominally authoritative, [but] in fact recommendatory only." James Madison, *Vices of the Political System of the United States* (Apr. 1787), *in* 9 *The Papers of James Madison* 345, 352 (Robert A. Rutland & William M. E. Rachal eds., 1975).

When the Framers gathered in Philadelphia to create a new national charter, they took pains to ensure that the federal courts would have the power to enforce federal legal protections. Time and again, the Framers explained that the power of the courts under Article III would be co-extensive with the broad legislative powers granted to Congress under Article I. As James Madison explained, "[a]n effective Judiciary establishment commensurate to the legislative authority, was essential." 1 Max Farrand, *The Records of the Federal Convention of 1787* at 124 (1911); *see id.* at 128 (urging Convention to "vest the Genl. Govt. with authority to erect an Independent Judicial, coextensive wt. ye. Nation" (Madison)); *id.* at 147 ("[T]he Judicial, Legislative and Executive departments ought to be commensurate." (Wilson)). The Framers understood that "[n]o government ought to be so defective in its organization, as not to contain within

itself the means of securing the execution of its own laws," and gave to the federal courts "the power of construing the constitution and laws of the Union in every case, . . . and of preserving them from all violation from every quarter." *Cohens*, 19 U.S. at 387, 388.

The Framers wanted to endow the federal courts with these broad powers not only because they saw the harms caused by the absence of a strong, independent federal judiciary under the government established by the Articles of Confederation, but also because, consistent with English common law traditions, they recognized that legal rights were meaningless without the ability of individuals to go to court to obtain a legal remedy. In other words, they understood that for courts to play their essential role of expounding the law and vindicating individual rights, rights and remedies had to go hand in hand. As William Blackstone had written, it was a "general and indisputable rule, that where there is a legal right there is also a legal remedy, by suit or action at law, whenever that right is invaded." 3 William Blackstone, *Commentaries on the Laws of England* *23. "[I]n vain would rights be declared, in vain directed to be observed," Blackstone declared, "if there were no method of recovering and asserting these rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law." 1 *id.* at *55-56.

These fundamental rule-of-law values were affirmed by a number of Founding-era state constitutions, which explicitly guaranteed redress for a violation of a legal right. For example, the Massachusetts Constitution of 1780 provided that "[e]very subject . . . ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he

may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay, conformably to the laws." Mass. Const. of 1780, art. XI. Numerous other state constitutions used similar formulations to protect the right of individuals to seek redress in the courts for violations of their legal rights. *See, e.g.,* Md. Const. of 1776, art. XVII; N.H. Const. of 1784, art. XIV; Vt. Const. of 1786, ch. 1, para. 4; Pa. Const. of 1790, art. IX, § 11; Del. Const. of 1792, art. I, § 9; Ky. Const. of 1792, art. XII, § 13; Tenn. Const. of 1796, art. XI, § 17.

In the debates over ratification of the U.S. Constitution, Federalists and Anti-Federalists alike agreed that Article III gave the federal courts extensive powers to enforce federal legal commands. In the state ratifying conventions, supporters of the Constitution repeatedly made the case that "[t]he federal government ought to possess the means of carrying the laws into execution. . . . If laws are not to be carried into execution by the interposition of the judiciary, how is it to be done?" 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 157 (Jonathan Elliot ed., 1836) (Davie); *see also* 3 *id.* at 517 (insisting that "the power of the judiciary must be coëxtensive with the legislative power, and reach to all parts of society" (Pendleton)); *id.* at 532 ("[I]t is so necessary and expedient that the judicial power should correspond with the legislative . . . ." (Madison)). Future Chief Justice John Marshall argued that it was "necessary that the federal courts should have cognizance of cases arising under the Constitution, and the laws, of the United States," observing that "the service or purpose of a judiciary" is to "execute the laws in a peaceable, orderly manner,

without shedding blood, or creating a contest, or availing yourselves of force[.] If this be the case, where can its jurisdiction be more necessary than here?" *Id.* at 554.

Anti-Federalists complained bitterly about Article III's broad sweep, insisting that "[t]he jurisdiction of all cases arising under the Constitution and the laws of the Union is of stupendous magnitude." *Id.* at 565 (Grayson). But these arguments did not carry the day. Rejecting Anti-Federalist claims that the breadth of judicial power conferred in Article III was too sweeping, the American people ratified the Constitution, giving the newly created federal courts broad judicial power to ensure that "the Constitution should be carried into effect, that the laws should be executed, justice equally done to all the community, and treaties observed." 4 *id.* at 160 (Davie).

In *Marbury v. Madison*, Chief Justice Marshall reaffirmed the fundamental rule-of-law principles that the U.S. Constitution secured, explaining that, under Article III, a broad understanding of an individual's right to go to court to redress violations of personal rights was necessary to ensure "[t]he very essence of civil liberty" and realize our Constitution's promise of a "government of laws, and not of men." *Marbury*, 5 U.S. at 170, 163. Marshall also invoked Blackstone's discussion of common law principles that ensure that "'every right, when withheld, must have a remedy, and every injury its proper redress.'" *Id.* (quoting 3 Blackstone, *supra*, *109). Thus, he concluded, "where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, . . . the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Id.* at 166; *see Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 350 (1816) (rejecting

construction of Article III because the result "would, in many cases, be rights without corresponding remedies"); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 624 (1838) (explaining that it would be a "monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist").

During the Framing-era, courts in both England and the United States routinely applied the rule that where there is a legal right there is also a legal remedy. In the celebrated case of *Ashby v. White*, (1702) 92 Eng. Rep. 126, for example, Chief Judge Holt explained that "[i]f the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy." *Ashby*, 92 Eng. Rep. at 136 (Holt, C.J., dissenting), *rev'd*, (1703) 91 Eng. Rep. 665;[2] *see Whipple v. Cumberland Mfg. Co.,* 29 F. Cas. 934, 936 (C.C.D. Me. 1843) (Story, J.) (holding that "wherever a wrong is done to a right, the law imports, that there is some damage to the right, and, in the absence of any other proof of substantial damage, nominal damages will be given in support of the right" and explaining that "[t]his is a well-known and well-settled doctrine in the law"); *Hendrick v. Cook*, 4 Ga. 241, 261 (1848) ("whenever there has been an illegal invasion of the *rights* of another, it is an *injury*, for which he is entitled to a remedy by an action" (emphasis in original)); *Parker v. Griswold*, 17 Conn. 288, 303 (1846) ("An injury is a wrong; and for the re-

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[2] Holt's opinion, though delivered in dissent, "prevailed on appeal in the House of Lords" and was regarded as "correctly stating the law." F. Andrew Hessick, *Standing, Injury In Fact, and Private Rights*, 93 Cornell L. Rev. 275, 282-83 (2008).

dress of every wrong there is a remedy . . . . Where therefore there has been a violation of a right, the person injured is entitled to an action."); *Allaire v. Whitney*, 1 Hill 484, 487 (N.Y. Sup. Ct. 1841) ("[A]ctual damage is not necessary to an action. A violation of right with a possibility of damage, forms the ground of an action.").

Thus, when the Framers drafted Article III, they were acting against the backdrop of a long history of common law precedents that firmly established that where there is a legal wrong, there is a legal remedy. And they conferred on the federal courts a broad "judicial power" capacious enough to ensure that the federal courts could, in fact, provide legal remedies to redress legal wrongs. Federal Rule of Civil Procedure 23 was adopted, in part, to facilitate the courts' ability to play their intended role in our constitutional system, as the next Section demonstrates.

2. Rule 23 Was Adopted, In Part, To Facilitate the Ability of the Federal Courts To Fulfill Article III's Goal of Establishing a Forum Capable of Providing Redress for All Legal Wrongs

Rule 23 provides that "[a] class action may be maintained if," among other things, "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). First promulgated in 1938, the original Rule 23 was adopted to codify a rule of equity that permitted class actions where cases involved a question of "common or general interest to many persons constituting a class so numerous as to make it im-

practicable to bring them all before the court." Fed. R. Civ. P. 23, 1937 advisory committee note to subdivision (a); *see Smith v. Swormstedt*, 57 U.S. 288, 302 (1853) ("The rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others.").

Although the rule as originally drafted ended up raising more questions than it answered about how class claims should be litigated, *see* Fed. R. Civ. P. 23, 1966 advisory committee notes, "the [advisory] committee [on the Federal Civil Rules] was convinced that the preservation of class actions to address common issues of fact or law was appropriate and necessary." Rabiej, *supra*, at 333. Indeed, commentators at the time recognized that class claims could not only be efficient for the courts, but could also provide real benefits to injured parties, allowing them to bring cases in contexts in which it would not otherwise be practically feasible: "Modern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive." Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684, 686 (1940); *id.* at 685 (discussing a case in which "almost no single investor's stake would warrant the enormous expense of his seeking legal redress").

Indeed, in the years immediately preceding the amendment of the Rule, lower courts "recognized the need for a vehicle to redress properly the grievances of small claimants." Tom Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C.L. Rev.

501, 505 (1969). The Second Circuit, for example, recognized that "there is a particular need for the representative action as a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group." *Escott v. Barchris Constr. Corp.*, 340 F.2d 731, 733 (2d Cir. 1965); *see Dolgow v. Anderson*, 43 F.R.D. 472, 485 (E.D.N.Y. 1968), *judgment rev'd*, 438 F.2d 825 (2d Cir. 1970) ("in view of the fact that the costs of the litigation would far exceed any damages the individual plaintiffs might possibly recover, if this case does not proceed as a class action, it is unlikely that it would proceed at all. Thus, to hold that this action could not proceed as a class action 'would . . . be tantamount to a denial of private relief.'" (quoting *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964), *abrogated by Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001))).

Responding to these needs, when the committee set out to revise Rule 23, one of its key goals was "to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." Benjamin Kaplan, *A Prefatory Note*, 10 B.C.L. Rev. 497, 497 (1969);[3] *see id.* (noting that "[t]he reform of Rule 23 was intended . . . to rebuild the law on functional lines responsive to those recurrent life patterns which call for mass litigation through representative parties"). As Judge Weinstein, whose academic writing "encourage[d]" the committee, *id.* at 499, noted, one of the advantages of class actions is that "[s]ome

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[3] Kaplan was "reporter to the Advisory Committee on Civil Rules from its organization in 1960 to July 1, 1966" and subsequently was "a member of the Committee." He notes, though, that "[t]he views expressed [in his article] are entirely personal." Kaplan, *supra*, at 497 n.*.

claims are individually so small that they cannot, as a practical matter, be enforced." Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buff. L. Rev. 433, 435 (1959).

Thus, part of the 1966 Amendment was the introduction of the Rule 23(b)(3) class action, which "encompasse[d] those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Fed. R. Civ. P. 23, 1966 advisory committee notes. "The expressed purpose of [this] amendment was [among other things] to create a procedural vehicle capable . . . 'of enabling small people with small claims to vindicate their rights when they could not otherwise do so.'" Rabiej, *supra*, at 336-37 (quoting Memorandum from the Advisory Committee on Civil Rules, *supra*, at 7); *see* Kaplan, *supra*, at 497 (the Advisory Committee had dominantly in mind vindication of "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all"). As one scholar wrote shortly after the Rule's amendment, one of the three purposes of the amended rule—"probably the most important"—was to "provide a vehicle for redressing small injuries to a large number of persons." Ford, *supra*, at 504; *see* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. Rev. 286, 315-16 (2013) ("The amendment also clearly envisioned the use of the class action to empower those without 'effective strength' to advance their claims, most notably when each individual's damages were so small that economically they had no independent litigation value.").

Indeed, in noting that the court must conclude that such a class action is "superior" to the other possible procedures for handling the case, the Advisory Committee Notes observe that one relevant factor is whether "the amounts at stake for individuals may be so small that separate suits would be impracticable." Fed. R. Civ. P. 23, 1966 advisory committee notes.

Subsequent meetings of the Civil Rules Advisory Committee have confirmed that Rule 23(b)(3) class actions were intended to provide a means for redressing legal wrongs when the size of the potential remedy would make individual suits impractical. *See* 1 *Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23* at 204 (Rules Comm. Support Office, Admin. Office of the U.S. Courts, May 1, 1997) ("(b)(3) classes represent both the dramatic expansion of remedies for small claims that could not profitably be pursued in individual actions and the growing efforts to aggregate claims that are (or would be) brought in individual actions"); *id.* at 238 (noting "the familiar phenomenon of class litigation to enforce claims that are strong on the merits but that would not bear the expense of individual litigation").

And this Court, too, has recognized that making it possible for small claimants to go to court was a critical goal of the drafters of the Rule 23 amendment:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); *see Deposit Guar. Nat'l Bank*, 445 U.S. at 339 ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.").

In sum, Federal Rule 23 was enacted to help ensure that Article III courts are able to provide legal remedies to redress legal wrongs, just as the Framers intended. Campbell-Ewald is wrong to argue that the federal courts do not have jurisdiction to adjudicate such claims simply because the defendant has made an offer of judgment that the plaintiff did not accept, as the next Section explains.

3. Campbell-Ewald's Jurisdictional and Policy Arguments Are Wrong and Misunderstand the Text and History of Both Article III and Federal Rule 23

As just discussed, a plaintiff's assertion of class claims helps effectuate the underlying purpose of Article III, and it would therefore fundamentally undermine the role of Article III courts to hold that such claims are moot simply because the defendant has made an unaccepted offer to resolve the plaintiff's individual claims. Campbell-Ewald's argument that Rule 23 does not "enlarge the jurisdiction of the courts" (Pet'r Br. 26) simply misses the point. The Article III courts were created to ensure that there is a federal forum available in which injured parties can seek legal remedies to redress legal wrongs. *See supra* at 8-12. When a plaintiff is asserting claims on behalf of a group of people whose federal legal rights

have been violated in similar fashion, such a claim falls quintessentially within the jurisdiction of the federal courts. That the plaintiff could have had his *individual* claim satisfied does nothing to change that fact. A court could still grant "effectual relief" on the class claims, and the case therefore is not moot. *See Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277, 2287 (2012) (quoting *Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)).

Campbell-Ewald argues that this Court's decision in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), "underscores the point" that an individual's class claims are "extinguished" when his individual claims are. Pet'r Br. 27. Not so. In fact, this Court explicitly distinguished cases involving class action claims from the collective action claims at issue in *Genesis*, noting that "Rule 23 actions are fundamentally different from collective actions under the FLSA." *Genesis*, 133 S. Ct. at 1529. Among other things, whereas "a putative class acquires an independent legal status once it is certified under Rule 23," "[t]he sole consequence of conditional certification [of an FLSA collective action] is the sending of court-approved written notice to employees," who need to "fil[e] written consent with the court" in order to join the action. *Id.* at 1530. That similarly situated parties are automatically bound by a class action unless they affirmatively choose to opt out is consistent with the class action's role as a vehicle for allowing injured parties to bring small claims that would not otherwise be redressable. *See* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the 'Class Action Problem'*, 92 Harv. L. Rev. 664, 674 (1979) ("The effect [of the shift from opt in to opt out] is to facilitate the aggregation of relatively small claims that are not indi-

vidually economically viable into a group claim that is sufficiently credible to be taken seriously."). And that is why it is inconsistent with both Rule 23 and Article III to hold that an unaccepted offer of judgment on an individual plaintiff's claims can moot *class* claims, simply because a class has not yet been certified.

Campbell-Ewald also argues that "the dismissal of this case . . . would better serve the interests of Rule 23 and any other potential claimants" because absent class members may not receive the full measure of statutory damages that the TCPA offers. Pet'r Br. 33. This argument ignores entirely that absent the ability to use a Rule 23 class action to seek relief for violations of the TCPA, most absent class members will receive no damages at all. *See* Miller, *Simplified Pleading*, *supra*, at 318 ("Realistically, the choice for class members is between collective access to the judicial system or no access at all."). Indeed, this was, as discussed earlier, a major reason why Rule 23 was amended to include the Rule 23(b)(3) class action in the first place. The drafters of the 1966 amendments to Rule 23 understood that in the absence of a class action device, many small claims would not be brought at all, and as a result, the federal courts would not be fulfilling their Article III purpose of providing a forum for the redress of legal wrongs.

Indeed, this Court has recognized that allowing defendants to moot class claims by making settlement offers to named plaintiffs would undermine this purpose of Rule 23. When considering whether a rejected offer could moot named plaintiffs' ability to appeal the denial of class certification, the Court noted

> [t]o deny the right to appeal simply because the defendant has sought to 'buy off' the

> individual private claims of the named plaintiffs would be contrary to sound judicial administration. Requiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.

Deposit Guar. Nat'l Bank, 445 U.S. at 339. In short, an unaccepted offer of judgment, whatever its effect on individual claims, cannot moot class claims.

B. This Court's Precedents Underscore That an Unaccepted Offer of Judgment Cannot Moot a Plaintiff's Class Claims

This Court's precedents underscore that an unaccepted offer of judgment cannot moot a plaintiff's interest in litigating his class claims.

In *Deposit Guaranty National Bank*, the Court considered whether "a tender to named plaintiffs in a class action of the amounts claimed in their individual capacities, followed by the entry of judgment in their favor on the basis of that tender, over their objection, moots the case and terminates their right to appeal the denial of class certification." *Id.* at 327. Recognizing the plaintiffs' "right to assert their own claims in the framework of a class action," this Court explained that "[n]either the rejected tender nor the dismissal of the action over plaintiffs' objections mooted the plaintiffs' claim on the merits so long as they retained an economic interest in class certification." *Id.* at 332-33; *see* Resp't Br. 12 (noting that

"Mr. Gomez retains an indisputable financial interest in the class-certification decision"); *id.* at 35 (discussing Mr. Gomez's "material interests in continuing the litigation").

Thus, while the Court "assume[d] that a district court's final judgment fully satisfying named plaintiffs' private substantive claims would preclude their appeal on that aspect of the final judgment," the Court also explained that "it does not follow that this circumstance would terminate the named plaintiffs' right to take an appeal on the issue of class certification." *Deposit Guar. Nat'l Bank*, 445 U.S. at 333. Noting that plaintiffs "have maintained throughout this appellate litigation that they retain a continuing individual interest in the resolution of the class certification question," the Court observed that "[t]he use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs" because "it may motivate them to bring cases that for economic reasons might not be brought otherwise." *Id.* at 336, 338. The Court thus held that plaintiffs retained an "individual interest in the litigation . . . sufficient to permit their appeal of the adverse certification ruling." *Id.* at 340 (emphasis omitted).

This Court's holding in *U.S. Parole Commission v. Geraghty*, 445 U.S. 388 (1980), also supports Gomez's claim here. There, this Court held that a court may review a denial of class certification even after the named plaintiff's personal claim has become moot, explaining that the "elements [necessary to assure a dispute capable of judicial resolution] can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired." *Geraghty*, 445 U.S. at 403. As the Court explained, "[t]he question whether class

certification is appropriate remains as a concrete, sharply presented issue." *Id.* at 403-04; *see id.* at 404 ("The proposed representative retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined."). To be sure, this Court in *Genesis* distinguished *Geraghty*, in part on the ground that the "named plaintiff's claim remain[ed] live at the time the district court denie[d] class certification," but the Court's "[m]ore fundamental[]" reason for distinguishing that case was that "a putative class acquires an independent legal status once it is certified under Rule 23" in a way that a collective action does not. 133 S. Ct. at 1530. That basis for distinguishing *Geraghty* obviously has no application here. Indeed, the fundamental rationale for this Court's decisions in both *Geraghty* and *Roper* was that a plaintiff retains an interest in determining whether class certification is appropriate even after his individual claim is mooted, and that rationale makes sense in light of the values underlying both Rule 23 and Article III.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court below.

Respectfully submitted,

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