

In The
Supreme Court of the United States

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ACT, INC.,

Petitioner,

v.

BAIS YAAKOV OF SPRING VALLEY,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

—◆—
**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE AND BRIEF OF
ANTHONY MICHAEL SABINO AS
AMICUS CURIAE IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

—◆—
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December 2015

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**MOTION FOR LEAVE TO FILE
BRIEF *AMICUS CURIAE***

Pursuant to Rule 37.2(b) of the Rules of this Court, Professor Anthony Michael Sabino (Sabino) hereby respectfully moves for leave to file the accompanying brief *amicus curiae* supporting the grant of review in this case. Sabino provided timely notice to the parties of his intent to file this brief. Petitioner has consented to filing; Respondent has withheld consent. The decision below deepens the sharp divide amongst the lower federal courts over the application of Federal Rule of Civil Procedure 68 in class actions regulated by Federal Rule of Civil Procedure 23. Sabino is a law professor with expertise in constitutional law, federal practice and procedure, and federal class actions, and has a professional and scholarly interest in the proper application and development of the law in this area. Sabino respectfully submits that his views on the importance of this case shed additional light on the issues presented here and the need for this Court's review. In light of those views and his substantial interest in the resolution of this case, Sabino respectfully requests that he be granted leave

to participate as an *amicus curiae* by filing the accompanying brief in support of the grant of review.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

This *amicus curiae* is a law professor with expertise in constitutional law, federal practice and procedure, and federal class actions. Furthermore, this *amicus curiae* recently concluded a litigation with the Respondent. That matter was voluntarily dismissed, with prejudice. This case addresses the plain meaning of Federal Rule of Civil Procedure 68, impacts Rule 23 class actions, and implicates the actual case or controversy requirement of Article III. This *amicus curiae* has a professional and scholarly interest in the proper application and development of the law in these domains.¹



STATEMENT

This *amicus curiae* respectfully adopts, in relevant part, the Statement of Facts set forth in the Petition for Certiorari filed by the Petitioner herein, ACT, Inc. (hereinafter, “Petitioner”). This *amicus curiae* furthermore joins in Petitioner’s Point II as reason for the Court to grant review.



¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record received timely notice of the intent to file this brief, as required by Supreme Court Rule 37.2(a). Petitioner consented to filing; Respondent withheld consent. This *amicus curiae* therefore has filed a motion for leave to file this brief.

SUMMARY OF ARGUMENT

Granting review of the instant case will afford the Court the opportunity to resolve the ever-increasing conflict amongst the lower courts as to the plain meaning of Federal Rules of Civil Procedure 68 and 23, the role of the former in class actions, and, finally, uphold the structural constraint upon the exercise of judicial power set forth in the actual cases and controversies clause of Article III.



ARGUMENT

I. GRANTING REVIEW OF THE INSTANT CASE WILL RESOLVE THE INTERNECINE CONFLICT OVER THE ROLE OF RULE 68 IN CLASS ACTIONS.

The lower federal courts are deeply divided over the application of Federal Rule of Civil Procedure 68 in class actions regulated by Federal Rule of Civil Procedure 23. A.M. Sabino & M.A. Sabino, “Applying Rule 68 on Offers of Judgment to Class Actions,” 253 *New York Law Journal* at p. 4, cl. 4 (June 1, 2015). The granting of review here will do much to end this controversy, and assure the Federal Rules are read in accordance with their plain meaning.

Some federal courts have ruled that Rule 68 applies to class actions. *Lary v. Rexall Sundown, Inc.*, 74 F.Supp.3d 540, 555 (E.D.N.Y. 2015), *appeal pending*, No. 15-601 (2d Cir. 2015). In contradistinction, other courts, even within the same circuit, have implied

that Rule 68 is somehow subordinate to Rule 23 or altogether inapplicable to class actions. *Compare Jones-Bartley v. McCabe, Weisberg & Conway, P.C.*, 59 F.Supp.3d 617, 638-40 (S.D.N.Y. 2014).

This *amicus* respectfully suggests this controversy is needless, wasteful, and antithetical to a number of maxims expressed by this Court. This Court has long held that the “one, cardinal canon” of construction is that a statute means what it says and says what it means. *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Such unerring rules of construction should likewise be applied to the Federal Rules of Civil Procedure relevant here.

The plain language of Rule 68 holds no textual prohibition rendering it inapplicable to class actions. Likewise, Rule 23 holds no bar to the application of Rule 68 in class actions governed by the former. The two Rules cannot be sensibly read as mutually exclusive. Consistency, predictability, and rationality are best served when these and all the Federal Rules are read according to their plain meaning.

The Federal Rules of Civil Procedure are created and amended via a statutorily prescribed process. *See* 28 U.S.C. § 2074. Congress had an opportunity in 1984 to render Rule 68 inapplicable to class actions via a simple amendment, yet it chose not to do so. *Lary, supra*, 74 F.Supp.3d at 556. Given the clear legislative choice not to amend Rule 68, it should not now be cabined by judicial tinkering.

The Constitution limits the Article III power to actual cases or controversies. Art. III, § 2, cl. 1. This requirement ensures that the Judicial Branch confines itself to its constitutionally defined role. *Genesis Healthcare Corp. v. Symczyk*, ___ U.S. ___, 133 S. Ct. 1523, 1528 (2013). *See also Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180 (2000). The judicial power ends once complete relief has been afforded a party. Rule 68 specifically works toward such a result. *See Lary, supra*, 74 F.Supp.3d at 556. A refusal to apply Rule 68 artificially extends the judicial power to matters no longer in controversy, thus violating Article III.

This *amicus* respectfully suggests the grant of review here shall assure that all the Federal Rules, most especially Rules 68 and 23, are read according to their plain meaning, legislative choices in language are not overridden by judicial misapprehensions, and the judicial power is preserved for actual cases or controversies, as Article III commands.

II. GRANTING REVIEW WILL PROVIDE CONSISTENCY WITH *CAMPBELL-EWALD CO. V. GOMEZ*.

This Court has already heard argument in *Campbell-Ewald Co. v. Gomez*, ___ U.S. ___, 135 S. Ct. 2311 (2015) (No. 14-857), a fundamentally similar case exemplifying the lower court conflict over Rule 68. This *amicus* respectfully suggests that the grant of review here shall afford a consistent resolution for both cases or, in the alternative, provide the

Court with the opportunity to address such matters that *Campbell-Ewald* might leave unresolved.

III. GRANTING REVIEW IS NECESSARY BECAUSE OF THE INTERSECTION HERE OF STATUTORY DAMAGES UNDER FEDERAL LAW, CLASS LITIGATION, AND ARTICLE III.

This case presents a crucial intersection, if not a collision, between three fundamental areas of federal law and procedure.

First, this action seeks clearly defined statutory damages pursuant to the Telephone Consumer Protection Act, 47 U.S.C. § 227(b), along with kindred state law statutory damage claims. *See* N.Y. General Business Law § 396-aa. Congress has already created a plethora of similar actions for statutory damages. The influence of Rule 68 upon such actions cannot be denied, as some courts have found Rule 68 well suited for resolving statutory damages claims. *See, i.e., Lary, supra*, 74 F.Supp.3d at 556-57. This *amicus* respectfully suggests that a grant of review will address the recurring question of Rule 68's role in federal actions for statutory damages.

Second, Rule 23 class actions play a significant role in federal litigation. *See generally Wal-Mart v. Dukes*, 564 U.S. ___, 131 S. Ct. 2541 (2011). This *amicus* respectfully suggests a grant of review is appropriate because, given the constancy and relative high stakes of federal class actions, the interplay between Rule 23 and the other Federal Rules, such as

Rule 68, is too important a matter to be left unresolved.

Third, the significance of the constitutional constraints that limit the application of the judicial power to actual cases or controversies cannot be underestimated. *See Genesis Healthcare, supra*. This *amicus* respectfully suggests a grant of review is needed to address the Article III question here.

This *amicus* respectfully suggests that any of the three matters set forth above would constitute sufficient cause to grant review here. With all three present, the grant of review becomes even more of an imperative, in order to prevent this intersection from becoming a collision.



CONCLUSION

Respectfully, for all the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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