NO. 12-744

IN THE

Supreme Court of the United States

CONVERGENT OUTSOURCING, INC.,
Petitioner,

v.

ANTHONY W. ZINNI,
Respondent.

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

RESPONDENT'S SUPPLEMENTAL BRIEF

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April 2013

In *Genesis Healthcare v. Symczyk*, this Court acknowledged, but declined to resolve, a circuit split on the question whether an unaccepted offer of judgment under Federal Rule of Civil Procedure 68 moots a plaintiff's claim. No. 11-1059, slip op. at 5 (Apr. 16, 2013). As described by the Court, the disagreement among the circuits is over whether "an unaccepted offer that *fully satisfies a plaintiff's claim* is sufficient to render the claim moot." *Id.* (emphasis added). That question is not presented here because the decision below concluded that, in the absence of a Rule 68 offer of judgment, Convergent "never offered full relief." Pet. App. 17a n.8. Indeed, the decision noted the same split in authority as *Genesis* and found it "not relevant to [its] analysis." *Id.* Like this Court in *Genesis*, the Eleventh Circuit thus declined to decide "whether an offer for full relief, even if rejected, would be enough to moot a plaintiff's claims." *Id.*

The split identified in *Genesis* involves *only* cases where, as in *Genesis* itself, the defendants made formal offers of judgment under Rule 68. *See Genesis*, slip op. at 5 & n.3 (citing *Weiss v. Regal Collections*, 385 F. 3d 337, 340 (3d. Cir. 2004); *McCauley v. Trans Union, LLC*, 402 F. 3d 340, 342 (2d Cir. 2005)). In contrast, Convergent argues here that it mooted the plaintiff's claims by sending an email that neither agreed to entry of judgment nor complied with the procedural requirements of Rule 68. The Eleventh Circuit, agreeing with the only other circuit to have addressed the question, found that distinction to be of "substantial importance." Pet. App. 18a (quoting *Simmons v. United Mortgage & Loan Invest., LLC*, 634 F.3d 754, 765 (4th Cir. 2011)). "[F]rom a plaintiff's perspective," the Fourth Circuit explained in *Simmons*, "a judgment entered by a court in his favor carries a substantial advantage over the same amount of recovery via a defendant's contractual promise to pay." *Simmons*, 634 F.3d at 765. No federal appellate authori-

ty of which we are aware has ever held that a mere offer to settle, without agreement to entry of an enforceable judgment, moots a plaintiff's claim.

Because Convergent never offered full relief in the form of an offer of judgment, this case presents no opportunity to resolve the split identified in *Genesis*. Nor does *Genesis* provide any reason to grant, vacate, and remand (GVR) the Eleventh Circuit's decision. Such an order is "potentially appropriate" when an intervening decision "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration[.]" *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). But even if the question identified in *Genesis* were relevant here, this Court's decision not to resolve the question would leave the Eleventh Circuit with no reason to reconsider its holding. Under these circumstances, a GVR would serve no purpose.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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